Nos. 99 and 96.

Brf. of Putney & Twombly for Hadden et al.

Supreme Court of the United States.

Filed Nov. 9, 1900.

HAROLD F. HADDEN and JAMES E. S. HADDEN,
Complainants and Appellants,

AGAINST

MICHAEL F. DOOLEY, individually and as Receiver of the First National Bank of Willimantic, Connecticut, and JOHN A. PANGBURN,
Defendants and Appellees. 99

MICHAEL F. DOOLEY, individually and as Receiver of the First National Bank of Willimantic, Connecticut, and JOHN A. PANGBURN,
Defendants and Appellants, 96

AGAINST

HAROLD F. HADDEN and JAMES E. S. HADDEN,
Complainants and Appellees.

BRIEF ON BEHALF OF HAROLD F. HADDEN AND JAMES E. S. HADDEN, ON THE CROSS-APPEALS.

This action was originally brought, in the New York Supreme Court, by the complainants, Harold F. Hadden and James E. S. Hadden, as judgment creditors of the Natchaug Silk Company, having a lien on certain goods, belonging to the said Silk Company, in the hands of the Sheriff of

Kings County, New York, to set aside a fraudulent transfer of said goods, made by the President of the Silk Company to the First National Bank of Willimantic, or to its Receiver, Michael F. Dooley; and to have the liens by attachment and execution, fraudulently and collusively obtained by the defendants Dooley and Pangburn, declared void and set aside, in favor of the complainants, and for an injunction *pendente lite* The action was removed to the United States Court, and the motion to continue the temporary injunction heard before Mr. Justice Lacombe, on July 30, 1895, and the temporary injunction was continued by order dated August 21, 1895. The defendants made two subsequent motions to dissolve this injunction, and from the order denying the last motion an appeal was taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the order continuing the said injunction (74 Fed. Rep., 429).

On proofs taken the defendants again moved to dissolve the said injunction, which motion was granted by Mr. Justice Lacombe, upon a misconception, as it afterwards appeared, of the effect of the decision of the Circuit Court of Appeals (Opinion, p. 712). The case then came on for final hearing before Mr. Justice Coxe, who dismissed the bill substantially upon the opinion of Judge Lacombe (p. 683).

The complainants then appealed from the judgment dismissing the bill to the Circuit Court of Appeals for the Second Circuit, which reversed the decree of the Circuit Court, and ordered the said Circuit Court to decree priority of lien to the complainants, upon a part, only, of the goods in question, viz., upon forty-five boxes out of the one hundred and seven boxes of silk in dispute (p. 722).

Opinions were written by Judge Shipman (pp. 708–716), and by Judge Wallace (pp. 717, 718). From a portion of this decree of the Circuit Court, the complainants appealed, on the ground that the decree should have adjudged to the complainants

priority of lien on *all* the goods in dispute (pp. 725–727); and the defendants have appealed, on the ground that the Circuit Court of Appeals erred in reversing the decree of the Circuit Court (p. 722). The questions presented by the cross-appeals are identical and will be discussed herein together.

The following is a general statement of facts which will be taken up in detail, under the different points:

Statement of Facts.

The Natchaug Silk Company was a Connecticut corporation, organized in October, 1887, with its principal place of business in Willimantic, in the State of Connecticut. Its business was the manufacture and sale of silk (fol 208). The capital stock of the company was $25,000 to start with, but was increased on August 27, 1888, to $200,000, and on February 7, 1893, to $250,000 (see minutes, fols. 1440-1441, 1503). The first Board of Directors included, among others, J. Dwight Chaffee, who was elected president and general manager; O. H. K. Risley, the cashier of the First National Bank of Willimantic; A. T. Fowler, a director in said Bank, and Charles Fenton, who was elected secretary and treasurer (fol. 1437). Until his death, on April 12, 1895, Risley, besides acting as cashier for the said Bank, attended to all the financial matters for the Silk Company (Fenton, fol. 101; Chaffee, fols. 1333, 1370), including all the accounts between the Bank and the Silk Company (fol. 1371). The Silk Company kept all its deposits at the Bank and made all its discounts there (fols. 136, 137), all through Risley.

The Bank, whose capital was only one hundred thousand dollars (Chaffee, fol. 1329), soon began to lend to the Silk Company amounts in excess of the ten thousand dollars' limit fixed by the National Banking Act (fol. 405), and on January 1, 1890, when this indebtedness was at least $80,000,

Risley induced Chaffee to give the Bank what purported to be a bill of sale of goods of the Natchaug Silk Company, to the amount of $26,610.24 (Ex. E 2 of April 3, p. 527), as security for such advances. There was, however, no change of possession of said goods, and the Silk Company went on disposing of these goods without regard to the alleged bill of sale (fols. 381–385). There is no evidence that this alleged sale was ever known by, or made known to, the Board of Directors of the Silk Company (fol. 209).

The Bank still went on lending to the Silk Company, so that in the spring of 1892 the debt of the Silk Company to the Bank was over $200,000. The alleged amount of indebtedness to the Bank, as set down in the Safeguard Ledger of the Silk Company (Barrows, fols. 230, 231) was $312,195.26 on December 1, 1893; $285,695.26 on December 1, 1894; $330,695.26 on January 1, 1895; $295,695.26 on April 1, 1895, and $319,926.59 on April 25, 1895.

The Discount Register and Bank Journal of the Bank (pp. 565–579) showed on discounted paper alone indebtedness to the Bank of $173,768.39 on January 1, 1891; of $155,918.39 on January 1, 1892; of $211,941.03 on January 1, 1893; of $226,441.03 on January 1, 1894, and of $203,363.66 on April 16, 1895.

Besides, the Bank officials, authorized by vote of the Board of Directors, guaranteed other notes of the Silk Company on August 26, 1892, $30,000 (p. 630); on January 4, 1893, $10,000 (p. 625); on November 26, 1894, $10,000 (p. 618); on December 26, 1894, $5,000 (p. 583); on February 26, 1895, $5,000 (p. 596); on March 2, 1895, $15,000 (p. 602).

The Silk Company was insolvent in 1893 (fols. 180, 182).

Knowing that a failure of the Silk Company meant a disclosure of this astounding mismanagement of the affairs of the Bank, Risley, with the aid of the bookkeeper of the Silk Company, made up false statements of the condition of the Silk Company, for the purpose of obtaining credit with the

raw silk dealers (fols. 1342–1344). These statements were sent out by Chaffee, who undoubtedly also knew their falsity, to Hadden & Co., the complainants herein, to the China and Japan Trading Company, and Morimura, Arai & Co., and were the procuring cause of the credit, by them extended, to the Silk Company (Hadden's testimony, fols. 466, 472; Aldridge's testimony, fol. 482; Briesen's testimony, fol. 495). In fact, the judgment which constitutes the complainants' standing in this suit was obtained on a claim for goods which were sold to the Silk Company solely by reason of, and on faith of, such false statements (Hadden's testimony, fol. 468). The falsity of the statement furnished Hadden & Co. can be seen by comparing it with the Safeguard Ledger of the Silk Company.

The statement to Hadden of December 1, 1893 (Exhibit 15, Apl. 3, p. 258), showed bills and accounts receivable amounting to $224,883.13, and bills and accounts payable amounting to $258,111.47, while the Safeguard Monthly Statement Book of the Silk Company (fols. 216–219), showed bills and accounts receivable, $143,890, and bills and accounts payable, $318,740.08. Comparing this latter statement with that furnished Hadden & Co., it will be seen that Hadden's statement showed $141,621.74 more assets than the Silk Company actually had.

In the accounts receivable were also included $67,797.36 charged to the Chicago sales account, in which all the goods sent to the Chicago office were charged up as sales, although the same goods were included in the statement of merchandise on hand. This Chicago account was wholly a fictitious account (Briesen, fol. 497).

The statement made December 1, 1894 (fols. 773, 774), to the raw silk dealers showed $72,257.68 more assets and $143,821.01 less debts than shown by the same items as set forth in the Safeguard Monthly Statement Book (fols. 220, 221), with $81,137.84 in the fictitious sales account charged to the Chicago office.

The laws of Connecticut required an annual statement of the business of the Silk Company to be filed with the Secretary of State of Connecticut, and the Town Clerk of Willimantic. These also were prepared by Risley (Chaffee's testimony, fols. 1333, 1342, 1343). It is here to be noted that the statement of February 15, 1892 (Exh. 5, p. 246) was signed before Risley, as notary, by A. T. Fowler, the then president of the Natchaug Silk Company, said Fowler being also a director of the First National Bank of Willimantic.

While these remarkable proceedings were going on, Michael F. Dooley, the present Receiver of the Bank, and one of the defendants herein, was appointed examiner of said Bank, and made his first examination in January, 1894. He at once found that "the Natchaug Silk Company was borrowing extravagantly, more than the Bank had a legal right to lend" (Dooley's testimony, fol. 405). The discount register and journal of the Bank show (pp. 565–579) that on January 1, 1894, the loans to the Silk Company amounted to $226,441.03 at least.

On or about January 15, 1894, Mr. Risley, at Dooley's request, got Chaffee to execute two alleged bills of sale (Exhibits A and B, pp. 508–509) of certain goods of the Natchaug Silk Company, to the amount of about $66,000, as security for the indebtedness of the Silk Company to the Bank. But in this case, also, there was no change of possession; the goods were not separated from the other stock of the Company, and were used as the business of the Company required (Fenton's testimony, pp. 126-129). The matter of this transfer was never brought up at a directors' meeting of the Silk Company (see minutes, pp. 471-507), and one, at least, of the Directors never heard of it until after the failure of the Silk Company (Wilson's testimony, fol. 209). Moreover, neither the statements filed in the office of the Secretary of State, nor any of the statements furnished the raw silk men, disclosed that any part of the merchandise had been pledged (Chaffee, fol. 1355).

Dooley again examined the Bank in December, 1894 (Dooley's testimony, fol. 404), but still nothing was done, though the loans to the Silk Company as disclosed by the discount register and the journal of the Bank were over $200,000 (pp. 565-579).

It was after the 1st of December, 1894, and on December 6, 1894, January 22, 1895, February 12, 1895, March 11, 1895 and April 17, 1895, that the complainants herein delivered raw silk to the Silk Company, to the amount of about $20,000 (Hadden's testimony, fol. 469), and after December 1, 1894, the silk sold by Morimura, Arai & Co. and China and Japan Trading Company was delivered to the Silk Company.

Risley died on the 12th day of April, 1895 (Fenton, fol. 101), and a few days after Chaffee was sent for by the directors of the Bank, including Fowler, and told that the Silk Company must make the Bank's security more certain at once (Chaffee's testimony, fols. 1266-1268), and Chaffee agreed to transfer to the Bank as security these goods in the mill, and those in all the offices of the Silk Company in Boston, Chicago, New York and elsewhere (Chaffee, fol. 1271). The directors of the Bank and Dooley insisted upon Chaffee's "putting these goods in a "place where they were better secured than in the "mill," so $20,000 worth of goods were shipped to New York (fols. 351-356) on April 15th, 16th, 17th and 19th. It was a part of Fenton's business to attend to shipping of goods from the mill. Chaffee, in giving Fenton the order to ship these goods, said nothing to him about sending them on account of the First National Bank (Fenton, fol. 355), but gave to Fenton the false excuse that, as the Silk Company could no longer get accommodations from the Bank it must raise money, and for that purpose must ship all the goods possible to New York (Fenton, fols. 108-109). The goods shipped contained but a small amount of the goods specified in the bills of sale of January, 1894 (Exhs. A and B of April 3, 1896; Fenton, fol. 388), but were goods which had largely been

manufactured out of the very raw silk furnished by Hadden & Co., Morimura, Arai & Co., and the China and Japan Trading Company as aforesaid (Fenton, fol. 111). The goods were shipped to D. E. Adams & Co., New York City (see Railroad Receipts, Exhs. 14–17, pp. 259–262), from whom the Silk Company rented half a store at 77 Greene street, and in whose employ was John H. Thompson, who also acted as agent for the Silk Company in New York (fol. 534).

On Monday, the 22d April, 1895, Chaffee went to Boston and ordered all the Silk Company's goods there to be shipped to New York; he then returned to Willimantic, and, without telling any of the Directors of the Silk Company what he was going to do (Fenton, fol. 107), with the possible exception of Fowler (the Director of the Bank), Chaffee went to New York with Mr. Solomon Lucas, who had been employed by Chaffee as attorney for the Silk Company and himself, personally (Chaffee, fols. 1320, 1321). In New York, on Tuesday, April 23d, Mr. Chaffee, as President of the Silk Company, executed the papers (Exhibits 1 and 2, pp. 241–243), alleged to be bills of sale of the goods then in the store, No. 77 Greene street, in New York City, for no present consideration and without the authority or knowledge of the Board of Directors of the Bank. There was no agent or officer of the Bank in New York, and he delivered the documents to his attorney, Lucas (Chaffee, fols. 1326–1328), but who, Chaffee says, was also acting for the Bank. There was no change of possession of these goods at that time, and, in fact, part of the goods from Boston (ten cases and a package), did not arrive in New York till the 24th April (Thompson, fol. 536). These ten cases and package were not transferred to the Bank by the bill of sale, made on April 23, 1895, as that purported to convey only the goods *then* in the store at 77 Greene street.

Chaffee then went to Chicago and Baltimore, and there executed similar alleged bills of sale of the goods of the Silk Company, in those cities (Chaffee,

fols. 1346–1349), returning so as to be in Willimantic on Monday, April 29, 1895.

The Bank had closed its doors, on April 22d, before Chaffee left for Boston (Fenton, fol. 154), and was in charge of the Examiner, Dooley, who, on the 23d April, was duly appointed Receiver by the Comptroller of the Currency.

Knowing that the Silk Company was insolvent (Chaffee, fol. 1366), and that a Receiver would have to be appointed, Chaffee had retained for the Silk Company a Mr. Perkins, of Hartford, who was also attorney for the Bank, and told Barrows, the bookkeeper of the Silk Company, if he wanted any advice to see Mr. Perkins. On Wednesday, April 24th, Mr. Perkins advised a receivership, and on Friday, April 26th, James E. Hayden was appointed Receiver of the Silk Company, on application of Barrows (Fenton, fols. 96, 97). On April 29th, Chaffee assembled together, in the office of the Silk Company, such of the Directors of the Silk Company as were attainable, including Fenton, Wilson and Fowler, and informed them of what he had done on his trip, and tried to get them to ratify his action. Dooley and Lucas were also present and persistently urged the Directors to ratify Chaffee's acts, saying that "it was very important." But they each and all (even Mr. Fowler, a Director in the Bank) refused to ratify what Chaffee had done (Wilson, fols. 196–200). The Board of Directors never had another meeting after the 29th of April (Fenton, fol. 179).

Apparently, about this time, Edward Winslow Paige was retained as attorney for Mr. Dooley, and, under his astute management, the following remarkable proceedings were carried through:

On April 29, 1895, a warrant of attachment was issued to the Sheriff of New York County, in the suit of Morimura, Arai & Co. against the Natchaug Silk Company. The Deputy Sheriff served the warrant on John H. Thompson, the New York

agent of the Silk Company, but did not take actual possession of the goods in question, as Thompson told him that he had no property of any kind, in the store, belonging to the Natchaug Silk Company (Ferguson, fols. 604, 605). But on May 2, 1895, sixty-two cases of these silk goods, in the store at 77 Greene street, were removed by Paige and stored in the warehouse of F. C. Linde & Co., in New York City, in the name of Edward Winslow Paige, and remained there until the 18th day of May, 1895, when, on Paige's orders, they were again removed to the Brooklyn Storage and Warehouse Company, in Brooklyn, where they were also stored in the name of Edward Winslow Paige (testimony of Linde, pp. 175–177, Exh. 20, p. 267).

On said 18th day of May, 1895, Paige commenced a suit in the Supreme Court of New York, entitled Michael F. Dooley, as Receiver, &c., against the Natchaug Silk Company, for the amount of $76,922.63, and on affidavits showing that the Silk Company was a foreign corporation, he obtained an attachment against the goods of the Natchaug Silk Company. On the 18th of May a warrant was issued to the Sheriff of Kings County, and under Mr. Paige's directions the Deputy Sheriff attached the goods in the Brooklyn warehouse, as the goods of the Natchaug Silk Company (testimony of Bradley, pp 193–197). Paige had previously arranged with Mr. Wayne, the manager of the warehouse, to allow the Sheriff to attach these goods (Wayne, fol. 508).

On the 16th day of May, 1895, Ignatius Rice commenced suit against the Silk Company, obtained an attachment, and the Sheriff, under the warrant, on the 18th of May, Saturday, placed a man in charge of the goods at 77 Greene street (Whoriskey, fols. 612–614), but subsequently withdrew him, as Thompson said he had no property of the Silk Company.

On the 21st day of May, 1895, these complainants began a suit in the Supreme Court of New York against the Natchaug Silk Company for $22,776.59. An attachment was obtained and a warrant issued

to the Sheriff of New York County. The Deputy Sheriff at once went to the office of the Silk Company, at 77 Greene street, and served the warrant on said John H. Thompson, but refused to take the goods until a bond was given to protect him. This was done as soon as possible, but in the meantime, and on the 25th of May, forty-three boxes of silk were removed under Paige's orders (Thompson, fols. 540, 541), and placed in the Brooklyn warehouse in the name of Edward Winslow Paige (Wayne, fol. 510, Exhibit 22, fol. 803), and these goods shortly after were also levied on by the Sheriff in the Dooley suit by Paige's directions. After these levies had been made, and on May 27, 1895, Paige ordered these goods to be transferred from his name to that of Michael F. Dooley, Receiver of the First National Bank of Willimantic (fol. 520), and we have the anomalous situation of an attachment levied by Dooley on goods standing in the name of Dooley.

To further bolster up Dooley's alleged title to these goods, and partly in order to obviate any legal objection which might arise from the fact that Dooley was a non-resident, Paige devised the following scheme: He arranged with one John A. Pangburn, a resident of Schenectady, and who was caretaker for certain houses in which Paige had some interest, for the use of his name as plaintiff (see Deposition of Pangburn, March 14, 1896, pp. 329-333), in some suit, as an accommodation to Mr. Paige. On petition of Dooley (Exhibit 51, pp. 295-302), verified May 31, 1895, asking for leave to sell certain notes of the Silk Company, amounting to $67,169.99 (alleged to be outstanding obligations of the Silk Company, but which the evidence shows either were never any obligation of the Silk Company at all or had been superseded and paid and were no longer outstanding), to said John A. Pangburn, for $200, on the ground that said notes were "doubtful debts," the United States Circuit Court for the Southern District of New York granted an *ex parte* order on said 31st day of May, authorizing such sale (p. 297).

Dooley at that time knew that the Silk Company would pay from 25 per cent. to 50 per cent. on his indebtedness (p. 143). Dooley, being in Hartford, Conn., executed an assignment to Pangburn on the 1st day of June, 1895, but the consideration of $200 was, as a matter of fact, never paid to Dooley by Pangburn.

Dooley testified, however, that he received a note from Paige telling him to credit the $200 on his account. And Pangburn is led to testify (Pangburn, fol. 654) that he authorized Paige to pay $200 for these notes out of moneys which Paige was then owing him. This was in spite of the fact that he (Pangburn) had previously testified that he paid no money for the notes, and, as it turned out, not Paige but the Paige estate owed money to Pangburn, if indeed there was any such debt at all (Pangburn, pp. 224–229).

On said 1st day of June, in Schenectady, Dooley began suit in Pangburn's name against the Silk Company, obtained an attachment for $67,169.99, issued a warrant to the Sheriff of Kings County (Exhibit 30, fols. 819–821), and, on June 3d, the Sheriff of Kings County levied on these goods in the Brooklyn warehouse.

The complainants could not discover the whereabout of these goods until the sixth day of June, 1895, when a warrant was at once issued to the Sheriff of Kings County, and levy made on these goods in the Brooklyn warehouse (Exhibit 32, fols. 825–827).

Paige next had Dooley's suit against the Silk Company removed to the United States Court, which was done on the 10th of June, 1895, by the aid of S. W. Jackson, an attorney employed for the occasion (Jackson, pp. 209–213; Fenton, fols. 128, 129; Chaffee, fols. 1380–1381), and then a motion was made by Mr. Paige for an order directing the Sheriff of Kings County to deliver to the United States Marshal, for the Northern District of New York, the property in his

hands. But the complainants at once moved to vacate the Dooley attachment, before Judge Coxe, and the said attachment was vacated, by order dated June 27, 1895 (Exhibit 50, pp. 294–295).

On June 26, 1895, the complainants entered their judgment for $22,948.95, and issued execution to the Sheriff of Kings County, which was levied upon the silk goods in the Brooklyn warehouse, and still remains outstanding.

On June 27, 1895, judgment in favor of Pangburn was entered by default, against the Silk Company, for $67,116.99, and execution issued to the Sheriff of Kings County, who at once, under orders from Paige, gave notice that he would sell these silk goods under the Pangburn execution on the 5th day of July, 1895.

The complainants thereupon, and on the 2d day of July, 1895, brought this present suit in the Supreme Court of New York against Pangburn and Dooley.

We propose to treat this case, first, with reference to the opinion of the Circuit Court of Appeals, and we shall show that, following out its own reasoning, as applied to the facts of this case, the Circuit Court of Appeals should not only have decreed priority of lien to the complainants on the forty-five boxes, but also on the whole one hundred and seven boxes in dispute, and that such a decree would be supported by the authorities (Assignment of Error "Ninth," p. 727).

Second, we shall claim that the bank is estopped from asserting any claim to the goods in question, as against the complainants, by reason of its complicity in the fraudulent scheme, whereby the complainants were induced to sell their goods to the Silk Company on credit, and were thereby defrauded (Assignments of Error, First—Eighth, pp. 725, 727).

If the Court sustains either of these first two propositions, no further discussion of the case is necessary.

Third: We further claim that the sale, by Chaffee to the Bank, was unauthorized, illegal and void.

Fourth: That the Pangburn judgment was based on an invalid claim against the Silk Company; that the assignment to Pangburn was obtained by a fraud on the Court, and that the attachment was a collusive proceeding between Pangburn and the Bank, and should not be allowed to stand as against the complainants.

Point I.

The decision of the Circuit Court of Appeals giving a priority of lien to the complainants, on the forty-five boxes of goods therein mentioned, is justified and required by the facts in the case, but the decision in so far as it limits the plaintiff's priority to the forty-five boxes of goods, is erroneous.

For the purposes of this argument, the statement of facts set forth in the opinion of Judge Shipman (pp. 708–712), will be taken to be correct, but some of his conclusions of fact will be questioned, and there will also be some additional facts which will be stated in the course of what follows:

The Circuit Court of Appeals has decided that the bills of sale or conveyances, however they may be designated, made in the name of the Silk Company, to and for the benefit of the Bank, on January 1, 1890, and in January, 1894, were illegal, and are to be regarded as fraudulent as against the creditors of the Silk Company. It is also held that the conveyances made to or for the benefit of the Bank, by Chaffee on April 23, 1895, were made by Chaffee without any authority, and conveyed no title from the Silk Company. From these findings it follows that the Bank obtained no valid lien upon the goods by the bills of sale made prior to April 23, 1895, as

against the creditors of the Silk Company, and it obtained no title or interest in the goods referred to in the bills of sale of April 23, 1895 (Exhibits 1 and 2, pages 241–243). So far as the creditors of the company were concerned, therefore, all the goods referred to in those bills of sale of April 23d still belonged to the Silk Company at the time when the complainants issued their attachment against the goods of the Silk Company, and when they obtained judgment and issued execution against those goods. They were therefore entitled to enforce their remedy against those goods, unless some other party had acquired a lien upon the goods which could be sustained by a court of equity.

The Circuit Court of Appeals held as to the priority of lien between the complainants and the Bank as follows: "The counsel for Dooley distrusted the validity of the bills of sale and desired to secure the Bank by the aid of legal proceedings. The Receiver of the Bank had an equal right with other creditors to take legal steps to secure its debt, but had no right to take unfair steps. The removals of the forty-five cases to Brooklyn and the storage of the property in the name of Mr. Paige so that it could be, in a measure, secreted for the purpose of preventing the complainants from completing their attachment of these cases, was an unfair step. Hadden & Co. first appeared as attaching creditors on May 21st. At this time sixty-two boxes had been attached in the Dooley suit, and forty-five were in Greene street. The removal of these boxes after May 21st to prevent the completion of the Hadden & Co. attachment was an unfair advantage in this race between creditors, and compels a court of equity to declare that the complainants should have a prior lien upon the cases which were in Greene street when the Sheriff's bond was being prepared. There is no apparent equity in giving priority to their attachment upon 107 cases, but they are entitled only to a prior lien upon the goods which they

attempted to attach, an attempt the success of which was foiled by a removal of the goods."

But on the same theory of unfair advantage, the evidence warranted amply a decree of priority of lien to the complainants on all the goods: First, because the Directors of the Bank, and Dooley, its Receiver, did know and were chargeable with knowledge of the fraudulent dealings of the Silk Company and the fraudulent acts of their cashier; and, second, because they attempted to secure to the Bank the fruits of such fraud, therefore the Bank is chargeable with all the means resorted to, to affect such security.

Dooley, Receiver, had issued an attachment which was vacated. Then Dooley, Receiver, and for the purposes of this case, the Bank, assigned nominally a claim for $67,594.66 to Pangburn, represented by notes of the Silk Company held by the Bank, and caused an attachment to be issued against the goods in that suit. It is true that Pangburn was nominally a third party, and it is assumed for the purposes of this argument that he had the ownership of the assigned claim as between him and the Silk Company, and that that company could not have questioned his title to the claim so assigned. But it is found and held by the Circuit Court of Appeals, that in point of fact Pangburn had not held this claim for himself, nor for his own benefit, but he was the mere "dummy" and instrument of the Bank, that is of Dooley, Receiver, and that whatever he did was for the benefit of the Bank. In equity, therefore, he must be regarded as the Bank for the purposes of this case. The question, therefore, is as to whether or not the Bank itself could in equity get these goods, or the proceeds thereof, as against the complainants, creditors of the Silk Company, under all the facts of this case. The complainants contend that a court of equity should hold the Bank estopped from asserting any claim to said goods or the proceeds thereof, as against them. It is necessary in this connection to restate the facts on which

this proposition is founded: The capital of the Bank was $100,000. It is found by the Court below that as early as 1890 the Bank had loaned to the Silk Company in excess of the limit of $10,000 allowed by law. It continued to make loans to the Silk Company in violation of the law, and to increase such amounts until in January, 1894, the loan is stated by the Court below to have amounted to about $300,000, Of course, Risley, the cashier, knew pertectly well that he was doing business with the Silk Company in a method which was in violation of the law. It appears that the knowledge of the amounts loaned to the Silk Company was not confined to Risley. This subject matter came before the Board of Directors of the Bank for its consideration (pp. 583, 596, 602, 618 and 625). There is no evidence in the case that any of the directors of the Bank were ignorant or without knowledge of all the dealings which were had between the Bank and the Silk Company. Judge Shipman, in his opinion, in folio 710 of the case, states, "there is no positive evidence that this state of affairs was previously not known by the directors of the Bank, but it could not have been otherwise than a complete surprise." This statement relates to the condition of the Bank in 1895. No director testified as a witness that he was not familiar with the situation of affairs; that he was ignorant as to what had been done as between the Bank and the Silk Company. It certainly was the duty of the directors of the company to know about the transactions of the Bank with the Silk Company and it must be presumed that they did know just what was done. There is no evidence in the case that Risley made false entries in the books of the Bank, or that he did anything to conceal what was done, from the knowledge of the other directors of the Bank. The discount ledger and the journal of the Bank showed plainly the state of the account with the Silk Company (pp. 565-579), and the guarantee of notes of the Silk Company in addition was authorized by vote of the Board of

Directors during the whole period between 1892 and 1895 (pp. 583, 596, 602, 608, 625 and 630). It must therefore fairly be concluded that the directors of the Bank did have knowledge of the transactions of the Bank with the Silk Company. Risley and Fowler, two directors of the Bank, were also directors of the Silk Company. Risley had charge of and controlled the making of the annual statements as to the financial condition of the Silk Company. These statements were statements which were required by the law of Connecticut to be made and to be filed, in public offices, and they were made, and not only filed, but circulated among the people with whom the Silk Company did business. These statements, false in every particular, were the procuring cause of obtaining credit for the Silk Company (fols. 468, 487, 495), and the life of the Bank depended upon the continuance of the Silk Company. Neither Risley nor Fowler can be held not to have had the knowledge of the condition of the Silk Company when they were acting as officers or Directors of the Bank in its dealings with the Silk Company; and, as before stated, the presumption as well as the proof is that the other directors of the Bank were acquainted with these transactions. At all times from 1890 the Bank was a creditor to a larger amount than was permitted by law, of the Silk Company. As early as 1890 Risley obtained from Chaffee a bill of sale to the amount of upwards of $26,000, to cover goods left in the possession of the Silk Company, and with the understanding that the goods were to be fluctuating; that the Silk Company could use those covered by the bill in their business, simply supplying new goods in their place (pp. 367, 368). In January, 1894, two new bills of sale to the Bank were made, to cover $66,000 worth of the goods of the Silk Company left in its possession, subject to its use and replacement in the same way (pp. 369, 370). These bills of sale were held by the Bank secretly. It was an attempt to create a secret lien in favor of the Bank, which would give

that Bank an advantage over other creditors of the company, in case of an exigency. In securing these bills of sale, certainly Mr. Risley was acting as the agent and representative of the Bank, and within the scope of his position in the Bank.

Now, when the Bank obtained the so-called bills of sale of goods of the Silk Company, if it was acting fairly, if it was acting without fraud towards other creditors of the Silk Company, it would have caused such bills of sale, which were in the nature of chattel mortgages, to be recorded, according to the laws of the State of Connecticut. Then the creditors of the Silk Company would have had notice of the fact that there were liens on the goods in the factory, and continued liens; that is to say, that there had been an attempt to make such liens; then the people who sold material to the Silk Company would have been put on inquiry, and it cannot be doubted that they would have refused to have given the credit that they did give. It was, therefore, known to the Bank that it was holding what purported to be a secret lien on the goods of the Silk Company, and to that extent it was directly a party to the procuring of credit fraudulently. Now, all this had been done prior to the death of Risley; the Bank knew of these fraudulent bills of sale, because its other directors, besides Risley, knew of them. It would seem to be clear, that as against creditors who had the right to attack the validity of these transfers, the Bank could not be in a position to claim any benefit from them, without its assuming and affirming that the plan to secure and keep such secret security was its act, and make itself, if it was not before directly, a party to it, a party to the plan by ratifying it and claiming the fruits of it. Now, we repeat the same propositions in respect to the bills of sale of April 23, 1895. They were not, indeed, made by the Silk Company or by its authority, and they conveyed no title. They were made, however, to the Bank, or Dooley, its Receiver, and he was a party to procuring them

to be made, and he then proceeded to plan that they should be made effectual as against other creditors. Now this whole scheme was not a new and independent one, as seems to be asserted by Judge Shipman (fol. 715). It was new in one respect, that is to say, it was an endorsement of the plan of securing the Bank, which had been in effect as far as it could be made effectual, for some years. It was new so far as it related to goods in Chicago and in Baltimore, and perhaps those in Boston, in respect to its being an addition to the security which Chaffee had undertaken to give and the Bank had undertaken to get, to the extent of $66,000 in 1894. But it was the intent and purpose both of Chaffee and of the officers or directors of the Bank, to perfect and make effectual these bills of sale of 1894, and this so-called new arrangement, so far as related to the $66,000 referred to, and those bills of sale were for that purpose. This proposition seems to be established by uncontradicted evidence.

Chaffee testified (pp. 370, 372) that prior to the shipment of the goods from Willimantic to New York on April 15–19, 1895 (see freight receipts, pp. 259–262) he was called over to the Bank and there met Dooley, the bank examiner, and the directors of the Bank; that "they insisted upon my putting "these goods (the goods included in the bills of sale "of January, 1894, or such as had been replaced "by other goods (fol. 1261)) into a place where they "were better secured than in the mill; so they "were shipped to New York for account of the "First National Bank" * * * "They insisted "that arrangements be made at once about securing the goods so that they would be positively secured to them;" * * * Mr. Henry (a director "of the Bank) said to me he wanted to know if I "could not ship these goods to some commission "house in New York where they could have full "charge of them;" that this was agreed to by all the Directors; that Dooley "asked me about the situation of the property over there. I told him it was

" in the vault and in the room. He wanted it put " somewhere where he could consider it better " secured than there, and it was shipped to New " York " (p. 376); that after having consulted the directors, he went to New York, and made the bills of sale of April 23, 1895 (p. 378); that to put these goods in New York City would make them more secured to Dooley than in Willimantic (p. 410); that Mr. Henry, one of the directors of the Bank, wanted it done (p. 411); Lucas, attorney for the Bank (p. 414), went with him from Willimantic to New York (p. 389).

The Receiver of the Bank, and its directors, feared that they could not hold the goods in the factory at Willimantic under their bills of sale of January, 1894, and to get them beyond the reach of a Receiver appointed in that State, and beyond the courts of that State, they caused the goods to be shipped, on the 15th day of April and thereafter, to New York, and then followed the execution of their plan to get further assurance of their title or lien to these goods.

Not only is this the testimony, but in the answer of the defendant, Dooley, in this suit (fol. 1206), he alleges that the whole or part of the same silk (the silk covered by the bills of sale of April 23d), had been transferred to the First National Bank as security for the same indebtedness which was found existing; that is, indebtedness existing January, 1894. So it is clearly established that the Bank actively participated in the transactions that were had, with a view to avail themselves of the fruits or benefits of these secret bills of sale; and the conveyances in New York, and the several proceedings in attachment and otherwise, had there, were all to carry out the same plan or purpose.

We find, therefore, the Receiver of the Bank in possession of one hundred and seven (107) boxes or packages of goods in New York. Of these only eighteen (18) came from Boston, the rest from Willimantic. We find the Receiver in possession under

conveyances made by Chaffee without authority, and therefore by a fraudulent scheme. The Bank, or its Receiver, was therefore wrongfully in possession of these goods, the title still remaining in the Silk Company. Now, certainly, the Bank, for the purpose of this case, is chargeable with the result of this fraudulent scheme. The fraudulent purposes and acts cannot be deprived of their character by what took place subsequently.

It is clearly established, then, that the Bank, represented by its directors or by its Receiver, knowingly undertook to secure to itself the full benefit and proceeds of the fraudulent bills of sale of January, 1894, and resorted to measures which were in themselves inequitable, to carry out that plan. The first step was to get these goods beyond the reach of any court of insolvency in Connecticut; so that advantage could not be taken of the illegality of these bills of sale—these concealed liens. The next step was to do something to cure the legal defects of these bills of sale. The goods were secreted first in the name of Adams, in New York; then the Receiver of the Bank brings his suit and obtains an attachment in New York; that attachment having been vacated, he next proceeds to get a third party, Pangburn, to issue an attachment. Now, it will not do to say that the Silk Company entered into any agreement to transfer these goods at this time by way of a preference, because what was done in all these matters was not done by the Company, but by Chaffee, and his acts, as a court below has decided, were in excess of his authority or power, and, therefore, ineffectual as against the Silk Company, or ineffectual to change title.

It was through the instructions of Mr. Paige, the counsel for Dooley, that an attorney was procured to remove Dooley's case to the United States Court; it was not by the act of the Silk Company. It was through the management of Dooley and his counsel that these goods, wrongfully in the possession of the Receiver in New York City, were illegally removed

to Brooklyn, where the attachment was levied in the Pangburn suit, nobody representing the Company having any knowledge of it, or having any opportunity to set up any defense to that claim, although it is apparent that there were grounds to set up at least a defense to some part of the claim.

The transfer of the notes to Pangburn, on which he brought suit, was obtained by obtaining an order of a Circuit Judge upon a petition which was fraudulent, as now appears. The selling of $67,500 worth of notes for $200 on the claim that it was a "doubtful debt," was obtaining an advantage and using the process of the Court by fraud.

At the time Dooley presented that petition he knew that it was false. One has only to read his own testimony on that subject to see that this is so (pp. 137-144). He does not pretend that there was any doubt in his mind as to the validity of the debt, but his whole contention from beginning to end has been that the debt was a valid one. His only question of doubt was as to how much could be collected of it, or how much would be paid. He thought the goods to be levied on were worth perhaps $40,000 (fol. 426); that would be $40,000 out of $66,000. He admits that he knew that there would be paid from twenty-five to fifty per cent. of those debts, and yet he applied to the Court for leave to sell for $200 on the statement that the debt was a "doubtful" one.

Thus having taken possession of all the goods illegally, the Receiver illegally removes them to Brooklyn in order to have the attachment in the Pangburn suit levied upon them, all for the interest of the Bank, which thus seeks to obtain the fruits of its whole course of fraud aforesaid.

Now on the principle laid down by the Circuit Court of Appeals that the Receiver of the Bank, although having an equal right with other creditors to take legal steps to secure its debt, had "no right "to take unfair steps," and that an unfair advantage taken by the said Receiver "compels a court of

" equity to declare that the complainants should " have a prior lien," surely it must be held that equity compels the Court to declare a prior lien on all the one hundred and seven boxes of silk in question.

Equity condemns each and every step taken by the Bank, not simply the transfer of the goods to Brooklyn whereby the complainants were foiled in their attempt to obtain a first attachment. The complainants did, also, attach the goods in Brooklyn and their attachment is second, only in point of time to that of Pangburn, but first in its equitable rights.

We claim therefore that the reasoning of the Circuit Court of Appeals carried to its logical conclusion requires a reversal of the decree in so far as it refuses to the complainants a priority of lien on all the silk in question.

Well settled law establishes the above contentions.

FIRST.

THE ATTACHMENT BY THE BANK, IN THE PANGBURN SUIT, WAS ILLEGAL AND SHOULD BE SET ASIDE AS AGAINST THE COMPLAINANTS.

The situation, in brief, is that, for the purpose of securing to the Bank the fruits of a fraudulent lien, the goods of the Silk Company were illegally brought from Connecticut to New York, illegal bills of sale were made to the Bank, under which the Receiver of the Bank takes possession, and illegally removes them to Brooklyn, to escape the levy of the attachments of the complainants and the other silk dealers, and for the express purpose of subjecting them to the levy under the Pangburn suit.

THE RULE IS WELL ESTABLISHED THAT WHERE A PARTY WRONGFULLY TAKES PROPERTY WHICH HE AFTERWARDS PRO-

CURES TO BE SEIZED AND SOLD UNDER PROCESS IN HIS OWN FAVOR, SUCH PROCESS AFFORDS HIM NO PROTECTION, AND IS HELD OF NO LEGAL FORCE.

Wehle *v.* Butler, 61 N. Y., 245, 248, 249, held that "where the party who wrongfully takes the property procures it to be afterward seized and sold "under process in his own favor, it affords him no "protection in any form."

The Court further says that if the law should allow such action, "it will come to this: One creditor "by force takes, at his pleasure, all the property of "his debtor and holds it against all the world until "by some legal process he may have it seized, under "the color of some form of law, and sold and converted to his use. In such case the diligent creditor, in the law, will have to be regarded as the "trespasser who asserts his supposed rights by the "strong hand. Our judicial system has not hitherto approved this extraordinary process, in any "form."

It has always been held that an attachment effected by trick is reprobated by the Court and held of no legal force.

Waples on Attachment, Sec. 301.

Shinn on Attachment, Sec. 207, holds that a levy effected by fraud or deceit will be set aside, as "where the creditor fraudulently obtains possession "in another State of the property of his debtor residing there, and without the knowledge or consent of such debtor brings it into this State and "immediately causes it to be attached."

Powell *v.* McKee, 4 La. Ann., 108.
Drake on Attachments, Sec. 193.
Corning *v.* Dreyfus, 20 Fed. Rep., 426.

In Powell *v.* McKee (*supra*) the plaintiff obtained fraudulent possession of the property of the defend-

ant in Mississippi, and removed it to Louisiana, where he attached the property. The Court held that it was a wrongful and fraudulent act of the plaintiff, and the attachment should be set aside.

In accord are Paradise *v.* Farmers' Bank, 5 La. Ann., 710; Wingate *v.* Wheat, 6 La. Ann., 238; Myers *v.* Myers, 8 La. Ann., 369, and Gilbert *v.* Hollinger, 14 La. Ann., 441.

In *Pomroy* v. *Parmlee*, 9 Iowa, 140, the Sheriff took possession of property in one county, pretending he had the right under a warrant of attachment, and took it into another county, where he attached it. The levy was held illegal.

Upton *v.* Craig, 57 Ill., 257, in acc.

In *Deyo* v. *Jennison*, 10 Allen, 410, the Court held that where the creditor procured the bringing of certain property into the State by fraudulent representation made to the debtor, and then attached the property, the attachment was invalid and should be vacated.

In *Corning* v. *Dreyfus*, 20 Fed. Rep., it was held: "As a proposition of law it is indisputable that when "a plaintiff has unlawfully obtained possession of a "debtor's property, for the purpose of levying pro- "cess upon it, such levy is wrongful and cannot be "upheld as against any one who is so situated that "he can urge its invalidity" (Wells *v.* Gurney, 8 Barn. & C., 769; Ilsley *v.* Nichols, 12 Pick., 270, and Closson *v.* Morrison, 47 N. H., 482).

Chubbuck *v.* Cleveland, 37 Minn., 466.

Under the rule above laid down, it would seem that the complainants have a right to have the levy of Pangburn on the one hundred and seven boxes set aside *in toto*.

SECOND.

WHETHER OR NOT THE BANK WAS CHARGEABLE ORIGINALLY WITH THE FRAUD OF RISLEY, BY SEEKING

TO SECURE TO ITSELF THE BENEFIT AND FRUITS OF RISLEY'S ACTS, THE BANK IS RESPONSIBLE FOR ALL THE FRAUDULENT MEANS EMPLOYED BY RISLEY AND ITS DIRECTORS TO THAT END.

We refer to the original fraudulent liens of January, 1890, and January, 1894; the false statements of the condition of the Silk Company, whereby credit was obtained for the Silk Company, at times when it was insolvent, when a refusal of credit to the Silk Company meant ruin to the Bank; the secret sending of the goods of the Silk Company to New York, the illegal bills of sale, and all the subsequent proceedings.

Mechem on Agency, § 178, holds: If the act of the "agent was tainted or procured by fraud, the prin-"cipal by ratification assumes responsibility for the "fraud," and that (§ 148) "if the principal has "knowingly appropriated and enjoyed the fruits and "benefits of an agent's acts, he will not afterwards "be heard to say that the acts were unauthorized," and that, "he who would avail himself of the ad-"vantages arising from the act of another in his "behalf must also assume the responsibilities."

As was said in Nat. Life Ins. Co. *v.* Minch, 53 N. Y., 144, 149: "It is established that an innocent "principal cannot take an advantage resulting from "the fraud of an agent without rendering himself "civilly liable to the injured party."

Bennett *v.* Judson, 21 N. Y., 238.
Elwell *v.* Chamberlin, 31 N. Y., 611, 619.

Cook on Corporations, § 140, states as to stock subscriptions obtained by fraud: "The question of "the authority of the agent taking the subscription "is immaterial herein. It matters not whether he "had any authority, or exceeded his authority, or "concealed its limitations. The corporation cannot "claim the benefits of his fraud without assuming

"also the representations which procured those "benefits."

Mason *vs.* Pewabic Mining Co , 60 Fed. Rep., 391, p. 402.

We quote a sentence from this decision:

"This money was borrowed by Daniel L. Demmon, "Secretary and Treasurer of the Pewabic Mining "Company, by authority of a resolution of the Di- "rectors. Demmon was also Secretary and Treasurer "of the Franklin Company, and seems to have rep- "resented the lender, as well as the borrower, in the "transaction. Under these circumstances the lend- "ing company is fully chargeable with knowledge of "all the facts which operated as a limitation upon "the power of the borrower, and obligated its assets "for a repayment of such a loan."

Nevada Bank *vs.* Portland Nat. Bank, 59 Fed. Rep., 338, held that a National Bank is liable for the fraudulent representations made by it through its cashier to another bank as to the financial responsibility of a customer. The case is one where the cashier of the bank knowing of the insolvency of a customer nevertheless made false representations as to the customer's condition and sent out with the letter of recommendation an annual statement of such customer known to the cashier to be false, for the purpose of getting credit for such customer, *with the end of reducing the indebtedness of the customer to said National Bank.* The Court held the bank bound by the representations of the cashier, and liable in damages to the injured bank.

Bank of America *vs.* McNeil, 10 Bush. (Ky.), 54, 59, was a case where the charter of a bank provided that the bank should have a lien upon the stock of its stockholders for all advances which might be made by the bank to such stockholders.

The cashier of the bank knew that a stockholder of the bank had pledged his bank stock to secure a debt to a third party; notwithstanding he allowed

the bank to discount certain notes for said stockholder, and, on his failure to pay, claimed a lien on his bank stock, under the bank charter, prior to the lien of the pledge. The Court held that the bank was estopped from making any such claim, as the knowledge of the cashier was the knowledge of the bank, and that if the cashier did not disclose to the Board of Directors the prior pledge, "and a loss " must result from his failure to do so, it should fall " upon the party for whom he acted, and not upon " a stranger in no wise responsible for his failure."

Des Moines Gas Co. *v.* West, 50 Iowa, 16, held that where a bank holds a majority of the shares of another corporation as pledge, but, nevertheless, allows the president of such other corporation, who is the legal owner of the shares, and from whom it has received them in pledge, to manage such other corporation, neglecting any oversight over him, it will be estopped as against an innocent purchaser of bonds of such other corporation, fraudulently issued and floated through the machinations of its president. Having the power to control such other corporation, but neglecting to do so, and remitting the control of it to its president, the savings bank was regarded in the shoes of the president in such sense as to be disabled from undoing his dishonest acts.

THIRD.

THE BANK, HAVING UNITED WITH THE SILK COMPANY IN CONCEALING THE STATE OF ITS INDEBTEDNESS AND IN CONCEALING THE SECRET, FRAUDULENT LIENS OF THE BILLS OF SALE OF JANUARY, 1890, AND JANUARY, 1894, WHEREBY THE COMPLAINANTS GAVE CREDIT TO THE SILK COMPANY, WHEN OTHERWISE NO CREDIT WOULD HAVE BEEN GIVEN, IS ESTOPPED FROM ASSERTING ITS CLAIM UNDER SUCH SECRET LIEN, OR UNDER PROCEEDINGS TAKEN TO EFFECTUATE SUCH LIEN.

The authorities to establish this proposition are fully set forth in Point II. of this brief.

But, although the case of the complainants might well be rested here, we go further and claim that the Bank is responsible for the fraud of its agents, and that equity will postpone its rights to those of the injured complainants, as is set forth more fully in the following point.

Point II.

The First National Bank of Willimantic, Dooley, its Receiver, and Pangburn, Dooley's assignee without consideration, are all and equally estopped from asserting any title to or claim upon the goods in question as against the complainants, as the said goods were largely made out of raw silk obtained from the complainants by false and fraudulent representations made and participated in by the Bank, with the purpose of securing to itself the fruits of such fraud.

The Silk Company was organized in October, 1887. O. H. K. Risley, who was the cashier of the Bank, was a director in the Silk Company and its sole financial manager from the time of its organization to the date of his death, April 12, 1895 (Fenton, fol. 101). Another director of the Silk Company, A. T. Fowler, was also a director of the Bank (Chaffee, fol. 1265).

It is important to see how the business between the Silk Company and the Bank was done.

All the Silk Company's accounts were kept with the Bank, all its money was deposited in the Bank, and all its discounts made by the Bank (Fenton, fols. 136, 137). Risley negotiated all the company's loans with the Bank (Fenton, fol. 186), and had charge of all the notes given by the Silk Company

(Barrows, fol. 238). He also made up all the accounts between the Silk Company and the Bank (Chaffee, fol. 1371), and attended to all the financial matters of the Silk Company. He acted for both corporations in their financial concerns.

The plaintiffs, Hadden & Co., prior to the 26th day of April, 1895, had been selling raw silk to the Natchaug Silk Company (fol. 463). Prior to the sale of raw silk (for the purchase price of which the plaintiffs sued and obtained judgment for $22,766.48 (fol. 15), which judgment is the basis of this action), the plaintiffs, on or about the 15th day of March, 1894, sought and obtained from the Silk Company a statement of its financial condition (Exs. 15, Apl. 3, p. 258), for the purpose of ascertaining whether the Silk Company was deserving of credit (fol. 466). It was solely on the strength of this statement and previous statements that the plaintiffs sold the Silk Company, on credit, the said silk (fol. 468).

A further statement of the financial condition of the company as of December 1, 1894 (Ex. 17, April 10, p. 266), was also furnished thereafter to the raw silk dealers (Aldridge, fols. 480, 481; Briesen, fol. 493),

These statements were the same as those filed in the office of the Town Clerk of Willimantic and the Secretary of State, as required by the laws of Connecticut (fols. 123, 124; Exhibit 6, p. 247, and Exhibit 3, p. 244).

These statements of the Silk Company, so filed and sent to the plaintiffs, were made up by the cashier of the said Bank and sent to the plaintiffs and the other raw silk men (Chaffee, fols. 1333–1335, 1344; Barrows, fol. 213).

THESE STATEMENTS SO MADE UP BY THE CASHIER OF THE BANK WERE FALSE AND FRAUDULENT.

The Silk Company kept a book called the Monthly Safeguard Statement Book, containing what purported to be a monthly statement of the assets and

liabilities of the Silk Company, at the end of each month. This book was, however, *private*, and the results of the entries were for the private information of the officers of the company, and were not made known to the creditors.

A comparison of certain of the items as entered in this Monthly Safeguard Statement Book, with the statements sent to the creditors, show enormous discrepancies and prove beyond question the fraudulent character of the statements filed and sent to the creditors:

Dec. 1, 1893.	Hadden Statement. (Ex. 15, p. 258.)	Safeguard Book. (Fols. 218, 219.)	Discrepancy.
Bills & Accts. Receivable..	$224,883 13	$143,890 04	$80,993 09
Bills & Accts. Payable....	258,111 47	318,740 08	60,628 61
Total discrepancy.....			$141,621 70

Dec. 1, 1894.	Statement. (Ex. 17, p. 266.)	Safeguard Book. (Fols. 220, 221.	Discrepancy.
Bills & Accts. Receivable..	$154,825 98	$148,879 13	$5,946 85
Bills & Accts. Payable. ...	262,407 10	406,228 11	143,821 01
Merchandise	268,725 18	218,210 43	50,514 75
Total discrepancy.....			$200,282 81

It should be noted, also, that in the statements of accounts receivable there was included a charge to the Chicago office of the Silk Company of $67,797.36, on December 1, 1893, and of $81,136.84, on December 1, 1894. No such sales had been made, and all the merchandise of the Silk Company was included in its statements under the head of "Merchandise Account." These items were fictitious (Briesen, fol. 497; Chaffee, fol. 1346).

During all this time the Silk Company was insolvent, but it was kept alive by the credit obtained through these false statements (Fenton, fol. 182).

THESE STATEMENTS WERE KNOWINGLY AND DELIBERATELY FALSIFIED BY THE CASHIER OF THE BANK FOR THE BENEFIT OF THE BANK.

That Mr. Risley, cashier of the Bank, made up these statements is undisputed. Defendants' witness Chaffee, the president of the Silk Company, testified (fols. 1333–1334):

"The stock was made up by Mr. Bissell, I think, and given "to Mr. Risley.

"Q. Who made out the amount of debts? A. He made them "out.

"Q. Mr. Risley? A. Yes.

"Q. Who made out the amount of credits? A. He made up "the statements; the annual statements.

* * * * * * *

(Fol. 1344.) "Q. Do you know who made up this statement "(that of Dec. 1, 1894, Ex. 17, Apl. 10)? A. Mr. Risley."

Barrows, the bookkeeper of the Silk Company, aided Risley in making up these statements (fol. 213), and they had the Monthly Safeguard Book before them at the time of making them (Barrows, fol. 228).

Further, the note indebtedness to the Bank, alone, was on December 1, 1893, $312,195.26; and on December 1, 1894, $285,695.26 (fol. 230), much in excess of the total amount of indebtedness of the Silk Company as given to the silk dealers.

That these statements sent to the plaintiffs and others were deliberately falsified by the cashier of the Bank cannot be questioned.

THESE FALSE STATEMENTS WERE MADE AND SENT TO THE PLAINTIFFS BY THE CASHIER FOR THE BENEFIT OF THE BANK.

The capital of the Bank was $100,000, limiting, under the National Banking Laws, the right of the Bank to loan to any one person to the amount of $10,000 (Chaffee, fols. 1329, 1330).

The various accounts in the books of the Silk Company show apparently that the Silk Company was indebted to the Bank to the amount of at least $200,000, in 1892; December 1, 1893, $312,195.26,

and on December 1, 1894, $285,695.26 (Barrows, fols. 230, 231).

During all this time from 1893 at least the Silk Company was insolvent, but it was kept alive by the credit obtained through these false statements (Fenton, fols. 180 and 182).

If a true statement of the affairs of the Silk Company had been given the silk dealers, the company could not have obtained a dollar's worth of credit (Hadden, fol. 472; Aldredge, fol. 482; Briesen, fol. 496).

The Silk Company must be kept alive to work out its indebtedness to the Bank, and credit was the only thing that would keep it alive.

The life of the Bank was, therefore, dependent upon the Silk Company's receiving sufficient credit to continue its business. It was certainly in the line of Risley's duty to keep the Bank alive.

BUT FURTHER, HAVING OBTAINED CREDIT FOR THE SILK COMPANY BY THESE FALSE STATEMENTS, THE BANK THEN SEEKS TO CREATE A SECRET AND FRAUDULENT LIEN FOR ITSELF UPON THE GOODS SO FRAUDULENTLY GOTTEN ON CREDIT FROM THE PLAINTIFFS AND OTHERS.

The Cashier of the Bank arranged with Chaffee the President of the Silk Company, to have executed in January, 1890, what was claimed to be a bill of sale of goods of the Silk Company, to the amount of $26,610.24, to the Bank, as security for its debt to the Bank, said debt being even then more than the legal limit (fols. 1254–1257. Exh. E 2, April 3, p. 578), *the discount register and journal of the Bank showing a note indebtedness of* $80,107.72 (pp. 575–579).

Again in January, 1894, two other papers purporting to be bills of sale of goods of the Silk Company, amounting to $66,270.04, were given by Chaffee to the Bank, through Risley, as security for loans, said goods "including, as Chaffee testified" (fol. 1261), the goods in the other agreement, or

"such as had been replaced by such goods" (fols. 1258–1261, Exhs. A and B, pp. 559, 560.) *The discount register and journal of the Bank show on Jan. 1, 1894, an indebtedness of* $226,441.03.

But, in accordance with the agreement made between Chaffee and the Bank (fol. 1256), *there was no delivery of the goods to the Bank or change of possession.*

The goods were kept in the stock-room and safe of the Silk Company in its factory, apparently as its property, and the Silk Company filled its orders from them from time to time just as if no such bill of sale had been made. This was the only place where the Silk Company kept its manufactured stock (Fenton, pp. 126–130.)

Mr. Fenton had charge of the manufacturing department and of the stock of the company, and his testimony in respect to the transaction regarding these bills of sale of 1894 is as follows (fols. 382–384):

"Q. Did you keep your stock in the mill in any other place, "except that vault and the room? A. Did not.

"Q. Was there any particular part of the stock in that "room or vault set apart for Mr. Risley or the First National "Bank of Willimantic? A. I don't think there was any di- "vision of the stock made in the room. I have no recollection "of any division.

"Q. What was done with the stock in the vault and room? "A. It was used in filling orders.

"Q. Did you make any difference at all between one part of "the stock and any other part of the stock? A. Did not.

"Q. Neither whether it was in the vault or in the room? A. "No.

"Q. If an order came in to be filled by the Natchaug Silk "Company you went to the vault or to the rooms and used "whatever stuff you pleased? A. We did.

"Q. To fill that order? A. Yes, whether on this invoice or "the other.

"Q. Did you pay any attention to the invoice? A. I did not. "There was no invoice kept at the mill."

It is true that Chaffee testifies that a special room was built for the goods transferred to the Bank in

January, 1894 (fol. 1261), and the goods were placed separate therein and in the safe; that the room was kept locked, and Risley had a key to the room and the combination of the safe; but Chaffee was seldom in the mill (fol. 377) and his testimony is proved false by Fenton, an absolutely disinterested witness, as far as the complainants are concerned, who had charge of all the goods of the Silk Company, and who testified that none of the stock of the Silk Company was set apart for the Bank; that the so-called special room was the general stock-room where, and in the safe, all the stock of the company was kept (fol. 382); and that he "never knew of the room being locked" (fol. 380); and that the stock was used indiscriminately in filling orders (fol. 383).

There is no mention of any of these transfers (Exhibits E2, A and B, of April 3d) in the minutes of the Silk Company, and no evidence that any of the directors, except Chaffee, Risley, Fowler, who were all *participes criminis*, and Fenton, knew anything about them.

These bills of sale were never brought to the attention of the Directors of the Silk Company as a board, and they never acted upon them (Wilson, fol. 209). These transfers do not appear on the books of the Silk Company, nor was any mention made of them in any statement filed with the Secretary of State or sent to the plaintiffs and other creditors of the Silk Company.

THE BILLS OF SALE OF JANUARY, 1890, AND JANUARY, 1894, WERE THEREFORE FRAUDULENT AS AGAINST CREDITORS.

"The rule of law that the retention of possession "of personal property by a vendor is conclusive "evidence of a colorable title, is a rule of policy "required for the prevention of fraud and to be in-"flexibly maintained."

Webb *v.* Peck, 31 Conn., 500.
Colt *v.* Ives, 31 Conn., 35.

Norton *v.* Doolittle, 32 Conn., 410.
Shaw *v.* Smith, 48 Conn., 313.

Also that a chattel mortgage, unless recorded under certain formalities, is invalid unless there is delivery of possession.

Gaylor *v.* Harding, 37 Conn., 552.

Such is the law as far as we know in every State.

Mandeville *v.* Avery, 124 N. Y., 376.

The bills of sale of April 23, 1895, *were made as a continuance of the plan of security above referred to, and to carry it out and make it effectual at a time when it was an established fact that the Silk Company could not continue in business any longer, and were, also, fraudulent.*

It appears from the testimony that Mr. Risley died April 12, 1895, and Dooley, who had previously been an examiner of this Bank, took charge of the Bank, and on or about the 23d of April, 1895, was appointed Receiver of it.

The transfers of April, 1895, were fixed up between Dooley, the directors of the Bank and Chaffee, and outside of these no one of the directors of the Silk Company knew anything about it till after they had been made and a receiver of the Silk Company appointed.

The testimony of Chaffee (fol. 1263) was that Mr. Dooley and the directors of the Bank "insisted upon "my putting these goods into a place where they "were better secured than in the mill; so they "were shipped to New York, for account of the "First National Bank." * * * "They stated to "me that we must make the security perfectly "good" (fol. 1266). * * * "They insisted that "arrangements be made at once about securing the "goods, so that they would be positively secured to "them" (fol. 1268). The reason that Chaffee gave for the transfer of the goods to New York, that if the goods were turned over to the Bank in Willimantic it would create too much excitement (fol.

1382) is absolutely absurd, as the Bank and the Silk Company were, at that time, both insolvent and about to go into Receiver's hands, as all the parties knew.

The sole purpose of sending the goods to New York was to take the goods out of the jurisdiction of the Connecticut Courts, in order to effectuate these secret liens.

"A few days after Risley's death" (Risley died April 12, and the first shipment of goods was made April 15th), Mr. Dooley "asked me about the situ-"ation of the property over there. I told him "it was in the vault and in the room. He wanted "it put somewhere where he could consider it better "secured than there, and it was shipped to New "York" (Chaffee, fol. 1279). The transfer was, however, to include "the goods in Boston and all "the offices, and a certain amount out of the mill" (fol. 1271).

It will be further noted, as further evidence of the fact that the Bank and Dooley were trying to justify the transfers of April, 1895, by the fraudulent bills of sale of January, 1894, of which Dooley had been cognizant (fol. 1626), that Dooley's answer in this suit contains the following paragraph (fol. 1206):

"And he further alleges, upon information and "belief, that by two bills of sale, made by the Nat-"chaug Silk Company to the First National Bank "of Willimantic, in January, 1894, the whole or a "part of the same silk had been transferred to the "First National Bank of Willimantic as security for "the same indebtedness which was then existing."

That these bills of sale, though absolute on their face, were intended as a continuance of the security for the debt to the Bank only, is further shown by the fact that on the Bank's proof of claim to the Receiver of the Silk Company (p. 534), no credit is given for these goods; there is no testimony that

any value was ever fixed or placed upon these goods by either party, and no fixed consideration for the transfer appear on the face of the transfers themselves.

THE METHOD OF GETTING OFF THESE GOODS WAS UNDERHAND AND FRAUDULENT.

Fenton's testimony in respect to the shipping of the goods to New York is as follows (fols. 108-111):

"Q. Prior to April 22d, had the Natchaug Silk Company "shipped any goods to New York within a week? A. They "did.

"Q. State what the shipments were and to whom they were "sent? A. D. E. Adams, 77 Greene street.

"Q. What quantity of goods sent at that time? A. You "mean money value?

"Q. Both? A. I can't state the number of cases. They "were shipped on three different days; the 16th, 17th, and "18th of April.

"Q. 1895? A. Yes, '95.

"Q. What was the money value? A. In the neighborhood "of $20,000, I should say.

"Q. Do you know for what purpose these goods were "shipped? A. I supposed when they were shipped it was for "the purpose of borrowing money. That is what Mr. Chaffee "told me.

"Q. What did he state? A. He stated we could not get ac- "commodations from the Bank here any longer, and must "make arrangement for further money, and ship all the goods "we could spare to New York.

"Q. Anything else? A. Nothing more than his conversa- "tion. He mentioned one or two parties he thought we could "get money from.

"Q. Name them? A. One was William Skinner.

"Q. Who else? A. I don't remember any of the others.

"Q. Did he say anything about the First National Bank of "Willimantic in connection with these goods? A. No sir; he "did not.

"Q. What goods were these shipped to New York? A. Dress "goods and linings; tailor goods.

"Q. Were they the same character of goods as at that time "were in Boston, Chicago, Baltimore, New York and St. Louis? "A. The same thing, with the addition of braids in Baltimore "and some in New York.

"Q. From whom had you bought the raw silk out of which "these goods just mentioned were manufactured? A. Mori-

"mura, Arai & Co., Hadden & Company and China and Japan "Trading Company.

"Q. Hadden & Company are the plaintiffs in this action, and "the other two names are two of the defendants in this action? "A. Yes, sir.

"Q. The Natchaug Silk Company are still owing these par- "ties for the raw silk, aren't they? A. I suppose so."

* * * * * *

(Fols. 386, 388.) "Q. Did Mr. Chaffee say anything to you "at the time when the goods were sent to New York, April 15, "16 and 17, 1895, about sending them on account of the First "National Bank of Willimantic? A. He did not.

"Q. Did you know they were going to be sent to the First "National Bank? A. I did not. The First National Bank's "name was not mentioned in my hearing.

"Q. What did he say as to the reason for sending such a "large lot of goods to New York? A. As I said in my previous "testimony, to raise money.

"Q. How did you happen to make four different shipments? "A. He said to send all the goods we could possibly spare. "After I had sent what I thought we could spare without "breaking our stock too much, he said there was not enough "and must have more shipped. Then we made up another "lot.

"Q. In making up those invoices and the goods sent to New "York, did you make up stock from any particular portion of "the stock? A. No, only what we had and could spare best "without interfering with our filling orders.

"Q. Did you consider at the time of sending that stuff to "New York any transfer had been made to the First National Bank of Willimantic or inventory given to the First National "Bank of Willimantic? A. The matter was not spoken of in "my hearing.

"Q. And you did not consider it in making up the stock? A. No, sir."

It will be seen, from this testimony, that not only did the directors of the Bank, Dooley and Chaffee, arrange to make more secure the attempted pledge of goods under the bills of sale of January, 1894, but they arranged to put into the hands of the Receiver of the Bank substantially all the merchandise that the Silk Company had, including that in its Chicago offices, its offices in St. Louis and in Baltimore and Boston.

As far as regards the goods in question in this

suit, it is plain that the transaction between Chaffee and the Bank, in New York, was a transaction with the purpose of continuing, and making effective, the steps taken to pledge goods in 1894. As the transactions at that time were illegal and void, as against creditors, the subsequent transactions, being a part of that plan and to make it effective, must also be regarded as fraudulent.

THE FALSE STATEMENTS BY WHICH THE GOODS WERE OBTAINED FROM THE PLAINTIFFS AND OTHERS, THE SECRET AND FRAUDULENT BILLS OF SALE OF JANUARY, 1890, AND JANUARY, 1894, AND THE BILLS OF SALE OF APRIL, 1895, WERE ALL TRANSACTIONS PLANNED AND CARRIED OUT WITH THE KNOWLEDGE AND CONSENT OF THE BANK, ITS CASHIER AND ITS BOARD OF DIRECTORS.

Mr. Risley, the cashier, was, to all intents and purposes, the Bank; his knowledge was the knowledge of the Bank, and the Bank is responsible for his acts, inasmuch as a benefit to the Bank was intended to be secured by the use of these statements.

Moreover, what he did, fraudulent as to the creditors of the Silk Company as it may have been, was simply to carry out his line of duty; that is, to save and keep the Bank going. The security of the bills of sale would have been of little use to the Bank, if disclosed to the creditors of the Silk Company, and so they were kept secret. Also, the Bank must see the Silk Company had credit, so Risley, the cashier, made the false statements, that the Bank might not fail.

These statements were not only prepared by Risley, the cashier, but were known to Fowler, another director of the Bank; one of them, indeed, was signed by Fowler (p. 246). These statements were filed in the office of the Town Clerk, scarcely a stone's throw from the Bank, and were sent to the creditors of the Silk Company, of whom the Bank was the chief. The falsity of these statements, as

well as the enormous illegal indebtedness of the Silk Company, must be presumed to have been known to the directors of the Bank. There is no evidence that Risley falsified the books of the Bank, and the discount register and the journal of the Bank, both of which are in evidence (pp. 565–579) show, on simple inspection, that the amount of discounts on January 1, 1891, was $173,768.39, and increasing to $226,441.03 on January 1, 1894, and $203,363.66 on April 16, 1895.

The directors are presumed, as a matter of law, to have had knowledge of this condition.

There is no evidence in the case to the contrary, and, furthermore, the fact that the Receiver of the Bank called not one of the directors of the Bank as a witness to deny such knowledge creates the further presumption that, had such directors been called, their evidence would have been adverse to the Receiver.

As was said, in Hanover Bank *v.* American Dock & Trust Company, 148 N. Y., 612, 623:

"The language used by the Supreme Court of the " United States with reference to a bank, may be " repeated here as applicable to the defendant: 'Di- " 'rectors cannot, in justice to those who deal with "'the bank, shut their eyes to what is going on " 'around them. It is their duty to use ordinary " 'diligence in ascertaining the condition of its " 'business and to exercise reasonable control and " 'supervision of its officers. They have something " 'more to do than, from time to time, to elect " 'officers of the bank and to make declarations of " 'dividends. That which they ought, by proper " 'diligence, to have known as to the general course " 'of business in the bank, they may be presumed " 'to have known in any contest between the cor- " 'poration and those who are justified by the " 'circumstances in dealing with its officers upon " 'the basis of that course of business.'" (Martin *v.* Webb, 110 U. S., 7, 15).

"Whatever the entries in the books of the defend-
"ant, made in the ordinary conduct of its business,
"would have disclosed, the jury would have been
"warranted in finding had come to the knowledge
"of the directors, who were charged with the duty
"of reasonable inspection of the books and reason-
"able supervision of the conduct of the officers."

Warner *v.* Penoyer, 91 Fed. Rep., 587, 593 (Circuit Court of Appeals, 2d Circuit).

What was said of the Directors of ~~the First~~ National Bank of Wilmington, in Robinson *v.* Hall, 63 Fed. Rep., 222, applies equally to the Directors of the Willimantic Bank:

"The frauds and irregularities which resulted in the
"ruin of the bank went on through a period of more
"than three years, during all of which time the de-
"fendant directors were in office. Many of these
"irregularities were not things of secret occurrence
"and sudden development. They were such as
"must have been known to the defendants, if they
"gave even the most casual attention to the affairs
"of the bank."

Gibbons *v.* Anderson, 80 Fed. Rep., 345.

On the question of the adverse presumption created by the failure of a party to call a witness who would have knowledge of the facts in dispute, see Rider *v.* Miller, 86 N. Y., 507; Cushman *v.* Maillie, 46 App. Div. (N. Y), 379, 381; Milliman *v.* R. R. Co., 3 App. Div., 109, 112.

But we are not left to a presumption of law to prove the guilty knowledge of the directors. On August 22, 1892, the indebtedness being over $150,000, the Bank guaranteed an additional $30,000 of the paper of the Silk Company (p. 630); on January 4, 1893, *by vote of the Board of Directors* (p. 625), the Bank guaranteed $10,000 of the Silk Company's paper; and on November 26, 1894, $10,000 of the

Silk Company's paper (p. 618); on December 26, 1894, $5,000 (p. 583); on February 26, 1895, $5,000 (p. 596); and on March 2, 1895, $15,000 (p. 602) were guaranteed, also by vote of the Board of Directors, attested by the secretary and president.

Other notes of the Silk Company were guaranteed, but whether by vote of the directors does not appear in the evidence, $10,000 on February 11, 1895 (p. 592). See, also, letters between Stedman, Steere and Wheeler, and Risley, cashier, of August, 1892 (p. 631), and of December 28, 1892 (p. 632).

~~Moreover, the bills of sale of January, 1894, were given at the instance of the Bank Examiner, as appeared from the endorsement of "Thanks, M. F. Dooley," on the bill of sale of January 15, 1900. Is it likely that the directors had no knowledge of this transaction?~~

If any further evidence of the knowledge of the directors of the Bank of the condition of affairs between the Bank and the Silk Company is necessary, it is furnished by the events of the meeting of the directors of the Bank in April, 1895, when they insisted that the security intended to be given by the bills of sale of January, 1894, be made good, so that the goods could be positively secured to them (pp. 371, 375), and their knowledge of the fraudulent nature of the security is shown by their urgency that the goods must be shipped out of the State.

Furthermore, if ignorance is alleged, the moment the directors sought to secure to the Bank, by the transfers of April, 1895, and the proceedings in connection therewith, the benefit of Risley's acts, the Bank became responsible for all the means resorted to by Risley.

> Nevada Bank *v.* Portland Bank, 59 Fed. Rep., 338, and cases cited under Second, Point I., *supra.*

If, then, the directors knew and were responsible for the situation, as between the Bank and the Silk Company, how can it be said that Risley was acting

outside his line of duty, in endeavoring to keep the Silk Company alive, in order to work out its indebtedness to the Bank?

The case of the American Surety Co. *vs.* Pauly, 170 U. S., 133, can have no application to facts, as disclosed in this case.

PANGBURN WAS A MERE TOOL OF DOOLEY, USED BY HIM TO EFFECTUATE THE FRAUDULENT LIEN OF THE BANK; HE WAS AN ASSIGNEE OF THE CLAIM, WITHOUT CONSIDERATION, AND IS AFFECTED WITH ALL THE EQUITIES WHICH EXIST AS AGAINST THE BANK.

His connection with the affair is fully set forth in Point IV. *infra*, but, in this connection, it is sufficient to say that he lent his name, as a convenience to the Bank, and for the ultimate benefit of the Bank. As far as his claim is concerned, therefore, he stands in no better position than the Bank.

Cole *v.* Cunningham, 133 U. S., 107.

To sum up;-- it is clearly established that the goods obtained from the complainants, and from the defendants Morimura, Arai & Co. and the China and Japan Trading Company, were obtained by means of fraudulent representations made to them as to the financial condition of the Silk Company. It is also established beyond dispute that these statements were made up by the cashier of the Bank; that such cashier had charge of the financial business of the Silk Company, and of all the dealings between the Silk Company and the Bank; that the safety of the Bank depended upon maintaining the credit of the Silk Company, which was insolvent, so that it could obtain goods on credit, and that the Bank had a direct interest in the obtaining of these goods, not only to keep the Silk Company alive, but to perpetuate the security which it had attempted to obtain from the Silk Company for its indebtedness

to the Bank. It is established that this security was concealed from the complainants and others similarly situated.

These Directors of the Bank knew, or were chargeable with the knowledge of, all these conditions and transactions.

The statements as to the condition of the Silk Company made up by the cashier of the Bank wholly omitted to disclose the fact that the Bank had, or claimed to hold, any security for the goods of the Silk Company. If such fact had been disclosed the complainants would never have given credit to the Silk Company. The Bank, therefore, was a direct party to the fraud practiced. It was a conspirator with Chaffee and with the Silk Company.

The foregoing evidence clearly establishes the following propositions:

1. The goods which are the subject of this controversy were made up largely, if not entirely, out of raw silk obtained from the complainants and the defendants, Morimura, Arai & Co. and the China and Japan Trading Company, on credit, solely by means of false and fraudulent representations.

2. The Bank, being vitally interested in securing credit for the Silk Company, then insolvent, not only knew that complainants' goods were obtained by such false and fraudulent representations, but in fact participated in making them, and arranged and planned to secure a benefit to itself thereby. That the present claim of title by the Receiver to the goods in question, or to an interest therein, is a claim made with a view to secure to the Bank the fruits of such fraud upon the complainants.

3. The Bank, whose very life depended upon the continuance of the Silk Company, united with the Silk Company in putting out false and fraudulent statements of the condition of the Silk Company,

and in fraudulently concealing the existence of the bills of sale to said Bank of January 1, 1890, and January 14 and 15, 1894, in order to get for the Silk Company credit with the plaintiffs, which otherwise the Silk Company could not have obtained. This misconduct of the Bank caused the loss to the complainants.

4. That Pangburn is a mere tool of Dooley, the Receiver of the Bank; he is an assignee without consideration and with notice, and has no better rights than the Bank itself.

5. Equity will not permit the defendants to assert any title to, or interest in, the goods in question as against the complainants.

6. This court of equity will lend its aid in favor of the complainants, to prevent the consummation of such fraud.

UNDER SUCH CIRCUMSTANCES THE BANK, ITS RECEIVER AND THE RECEIVER'S DUMMY PANGBURN, AN ASSIGNEE WITHOUT CONSIDERATION AND WITH NOTICE, ARE ALL AND EQUALLY ESTOPPED BY THE FRAUD OF THE BANK FROM CLAIMING ANY TITLE TO OR LIEN UPON THE GOODS IN QUESTION.

The law is well settled as to the estoppel.

Bacon *vs.* Harris, 62 Fed. Rep., 99, is a case directly in point. The facts are stated in the opinion. The Court there held:

"According to the general principles that sustain "the doctrine of estoppel by conduct, it seems clear "that a creditor who unites with his debtor in con- "cealing the fact of the indebtedness to him, and of "the existence of a mortgage or bill of sale to se- "cure the same, this being done to give the debtor "a credit which he could not have if the truth were "known, and to enable the debtor to obtain on

" credit money or property from third parties, may " be estopped from asserting his claim or lien, when " such estoppel is necessary to protect innocent third " parties from being defrauded out of the collection " of the debts due them, and which were created in " the belief that no lien or indebtedness existed in " favor of the party sought to be estopped.

" In Blennerhasset *vs.* Sherman, 105 U. S., 100, it " was held by the Supreme Court that:

" ' Where a mortgagee, knowing that his mortgagor is insol- " ' vent, for the purpose of giving him a fictitious credit, actively " ' conceals the mortgage which covers his entire estate and " ' withholds it from the record, and, while so concealing it, " ' represents the mortgagor as having a large estate and un- " ' limited credit, and by these means others are induced to " ' give him credit, and he fails, and is unable to pay the debts " ' thus contracted, the mortgage will be declared fraudulent " ' and void at common law, whether the motive of the mort- " ' gagee be gain to himself or advantage to his mortgagor.' "

" In the course of the opinion the Supreme Court " cited approvingly the following cases, to wit:

" Hungerford *vs.* Earle, 2 Vern., 261, wherein it " was held that: ' A deed not at first fraudulent may " ' afterwards become so by being concealed or not pur- " ' sued, by which means creditors are drawn in to lend their " ' money.' "

" Also Coates *vs.* Gerlash, 44 Pa. St., 43, wherein " it is said: ' There is another aspect of the case, not " ' at all favorable to the wife. It is that she withheld the " ' deed of her husband from record until December 2, 1857. " ' In asking that a deed void at law should be sustained in " ' equity, she is met with the fact that she asserted no right " ' under it, in fact concealed its existence, until after her " ' husband had contracted the debts against which " ' she now seeks to set it up. There appears to have been no " ' abandonment of possession by her husband. Even if the " ' deed was delivered on the day of its date, the supineness of " ' the wife gave to the husband a false credit, and equity will " ' not aid her at the expense of those who have been misled " ' by her laches.' "

"Also Hilliard *vs.* Cagle, 46 Miss., 309, wherein "the principal circumstance relied on to avoid a "deed of trust was the fact that the grantor re- "tained possession of the property and the deed was "withheld from record and the mortgagor was en- "abled to contract debts upon the presumption that "the property was unincumbered, the Court de- "claring:

"'That the natural and logical effect of the agreement and "'assignment, and the conduct of the parties thereto, was to "'mislead and deceive the public, and induce credit to be "'given to the mortgagor which he could not have obtained if "'the truth had been known; and therefore the whole scheme "'was fraudulent as to subsequent creditors, as much as if it "'had been contrived from that motive and for that object.'"

"Also Gill *vs.* Griffith, 2 Md. Ch., 270, wherein "it was held that a party cannot be permitted to "take a bill of sale or mortgage of chattels from "another for his own security, leave the mort- "gagor in possession and ostensibly the owner, and "at his request, and to keep the public from a "knowledge of its existence, withhold it from the "record an indefinite period, renewing it periodi- "cally, and then receive the benefit of it by plac- "ing the last renewal upon record, to the prejudice "of others whom the possession of that very prop- "erty by the mortgagor has induced to confide in "him."

"Also Hafner *vs.* Irwin, 1 Ired., 490, wherein a "deed of trust was withheld from record, and was "therefore held void as against creditors."

"Also Neslin *vs.* Wells, 104 U. S., 428, wherein a "mortgage was given to secure part of the pur- "chase money, and it was held that the failure to "record the same constituted such negligence and "laches as in equity requires that the loss which in "consequence thereof must fall on one of the two "shall be borne by him through whose fault it was "occasioned."

"This question has been recently considered by "the Supreme Court of Iowa, in the case of Goll & "Frank Co. *vs.* Miller, 54 N. W., 443, wherein the "facts are very similar to those in the case at bar. "It therein appeared that one Miller had at differ- "ent times executed chattel mortgages upon his "stock in trade to J. L. Nicodemus. These mort- "gages were not recorded. On the 16th day of "June, 1890, Miller executed a bill of sale of his "stock to Nicodemus, who took possession of the "property. Subsequently other creditors filed a bill "in equity, averring that they were entitled to "priority over Nicodemus, by reason of the fact "that he had withheld the previous mortgages from "record, thereby misleading them into giving credit "to Miller. After stating the facts the Court said:

"'It is charged that the withholding of the mortgages from "'record was a fraud as to the plaintiffs, and this is the prin- "'cipal question in the case. There can be no doubt that the "'withholding of the mortgages from record, in pursuance of "'an agreement between the parties, could have but one ob- "'ject, and that was to maintain the credit of Miller, and "'lead parties with whom he dealt to give credit to him, in "'the belief that he was not a chattel mortgage merchant. "'In such a case it is well settled that the mortgagee cannot "'be permitted to insist on the validity of his mortgage, as "'against those who have given credit to the mortgagor under "'such circumstances. Such a transaction is fraudulent as to "'the other creditors. * * * There are several grounds upon "'which it is claimed by counsel for the defendant that the "'rule above announced should not be applied to this case. "'The principal contention turns upon the alleged fact that "'the taking of the bill of sale on the 16th day of June *was an* "'*entirely new transaction; that the debt to Nicodemus was an honest* "'*obligation; and that, being a bona fide creditor, he had a right to* "'*secure his claim, even if it resulted in the bankruptcy of Miller.* "'*This is true if the bill of sale was the only act of Nicodemus which* "'*prevented the plaintiffs from securing their claims. But the bills* "'*of sale could not purge the several mortgages of their fraudulent* "'*character. The mischief was done by withholding the mortgages* "'*from the record. It is fair to presume that, if the mortgages had* "'*been placed on record, the plaintiffs would not have been creditors* "'*of Miller.*'" (Italics are ours.)

"The conclusion reached was that, upon the facts "of the case, it must be held that the bill of sale "was void as against creditors who had been misled "by the failure to record the pre-existing chattel "mortgages.

"The principles thus announced by the Supreme "Court of Iowa and the Supreme Court of the "United States are decisive of the case now before "the Court. The evidence shows that J. W. Orde "and R. A. Harbord, who were the president and "cashier of the private bank known as the Exchange "Bank of Sibley, became partners in the grain busi- "ness carried on under the name of A. W. Harris "& Co. The Exchange Bank was merged into the "Northwestern State Bank, J. W. Orde being presi- "dent and R. A. Harbord cashier thereof. In "April, 1891, a bill of sale, in the nature of a chat- "tel mortgage was executed and delivered to the "Northwestern State Bank, which covered substan- "tially all the partnership property. The mortgage "was not recorded until April 6, 1893. The reason "why it was so withheld from record could have "been no other than the one given by Harris in his "statement to the agent of complainants, in which "he stated that it was withheld from the record "because it would hurt his credit if it was filed, and "the bank assented to his request not to record it. "Having thus aided Harris in obtaining a false "credit from complainants and others, the bank "cannot now be permitted to assert that it has a "debt and lien superior in equity to the claims of "those whom it aided in defrauding. It needs no "elaboration of the facts to show that the bank is "estopped from asserting any rights as against com- "plainants under the bill of sale executed in April, "1891. It is, however, claimed that the bills of sale "executed to Thayer, assignee, in April, 1893, have "no relation to the bill of sale withheld from the "record, and the invalidity of the latter cannot af- "fect the former; that when Thayer, as assignee, "procured the execution of the bills of sale to him-

" self, he had no knowledge of the existence of the
" first bill of sale; and that, as assignee, he had the
" right to take the bills in payment of the indebted-
" ness actually due the bank of which he was as-
" signee. Thayer, as assignee of the bank, was not
" an innocent purchaser for value. He succeeded to
" the rights of the assignor but took its property
" subject to all rights and equities in favor of third
" parties. If the complainants had the right to
" estop the bank from asserting a superior claim to
" the assets of A. W. Harris, the same right existed
" as against the assignee of the bank. Therefore,
" the question is just as it would have been had
" the bank, previous to its assignment, taken
" the bills of sale now relied on under the circum-
" stances shown in the evidence. The wrong and
" fraud committed against third parties by with-
" holding knowledge of the existence of the chattel
" mortgage and the debt secured thereby is not
" obviated by the mere device of securing a new
" mortgage or bill of sale, as is well shown in the
" opinion of the Supreme Court of Iowa in Goll &
" Frank Co. *vs.* Miller, *supra.* The inequity charge-
" able against the bank is that it aided the debtor
" in concealing his real condition, and in obtaining
" a false credit, thereby misleading others, and in-
" ducing them to extend a credit which would not
" have been given had the truth not been con-
" cealed. The loss resulting from this conduct must
" fall upon one of the parties, and equity requires
" that it shall be visited upon the one whose mis-
" conduct has caused the loss."

Gill v. *Griffith*, 2 *Md. Ch.*, 270, 282.

Smith vs. *Craft*, 12 *Fed. Rep.*, 856, 861, held:

" Without saying that it was in the minds of
" Fletcher & Churchman and Craft at the time the
" last renewals were given, or at any other time,
" that the latter should get goods East on credit and
" turn them over to the former in payment of their

"debt, I think the preference was fraudulent on "other grounds. Fletcher & Churchman loaned "money to Craft on the faith of his agree- "ment to secure them to the exclusion of all "others, if he became insolvent. The complainants, "ignorant of these agreements, sold Craft goods on "time, trusting to his skill, energy and integrity. "They would not have done this, it is safe to as- "sume, if they had known of the agreements to "prefer Fletcher & Churchman at all hazards. "These agreements were in the nature of secret "liens, which the law will not allow to be enforced "against Craft's other creditors. Fletcher & "Churchman seem to have been on friendly and "confidential relations with Craft, and I have no "doubt they knew he was buying goods East on "time after the last renewals were given as well as "before. They assisted him in maintaining a credit "to which he was not entitled, and now claim the "proceeds of the entire stock against the injured "and deluded creditors."

Holden vs. *N. Y. & E. Bank*, 72 *N. Y.*, 286, was a case where "By the will of W. R. G., the execu- "tor, J. S. G., was authorized and required to set "apart, invest and hold a certain portion of the "funds of the estate for the purpose of certain "specified trusts. J. S. G. deposited nearly $17,000, "set apart from the assets of the estate as part of "the trust fund, to his credit as executor, in the N. "Y. & E. Bank, of which bank he was the president, "and of whose business affairs he had the entire "control and management. J. S. G., in fraud of "the *cestuis que trust*, caused certain shares of the "stock of the bank owned by him to be transferred "through a third person from himself individually "to himself as executor at par, he making the "transfers upon the books of the bank as president, "knowing at the time that the bank was insolvent "and the stock worthless. As part payment for "the stock he drew checks upon his account as

" executor for $17,000 and deposited the same to " the credit of his individual account, which was " at the time overdrawn $6,522.50. He was also " otherwise largely indebted to the Bank to much " more than the amount of the check. J. S. G. " subsequently drew out the balance deposited to " his individual credit. In an action to set aside " the transfer of the stock, and to recover of the " Bank the deposit, held, that the Bank was charge- " able with the knowledge possessed by its agent, " J. S. G., when making the transfers, whether ac- " quired by him as such agent as executor, or as an " individual, and was responsible for the fraud to " the extent that it profited thereby."

IT IS CLEAR FROM THE EVIDENCE THAT THE BOARD OF DIRECTORS WERE COGNIZANT OF AND CONSENTED TO THE FRAUD PRACTICED UPON THE COMPLAINANTS, BUT, FURTHER, THERE IS NO QUESTION BUT THAT, IN THE EYE OF THE LAW, RISLEY WAS THE BANK, AS FAR AS THE TRANSACTIONS IN QUESTION ARE CONCERNED.

In the case of the City National Bank of Dallas *vs.* The National Park Bank of New York, 32 Hun, 105, the Court uses the following language:

" The president had been permitted to become and " be the Bank, as representing all its corporate " functions, and, both figuratively, and in fact, to " be its eyes, ears and all the several senses that " can, in law or theory, pertain to corporate exist- " ence. When such a president starts out for a raid " upon the financial credulity of other banks and " capitalists, for the purpose of capturing funds " with which to relieve himself and his Bank from " the embarrassment into which he has plunged it, " there is no lack of reason or law in holding that " his knowledge of any fraud he commits in obtain- " ing the money shall be charged as notice to his " Bank, when it becomes the recipient of the plun- " der."

In the case at bar Risley was an agent of the Bank at the time of all its transactions with the Silk Company. The facts of the condition of the Silk Company were right in the line of his agency in making loans to the Silk Company; it was both in his power and it was his duty to make known the condition of the Silk Company to the directors of the Bank, and it was his duty as cashier and the chief executive officer of the Bank to act on such information. All the requirements of law are united in this case to make a conclusive presumption of law that his knowledge was the knowledge of the Bank.

4 Thomp., Corp., 5195.

4 *Thomp., Corp.*, 4740: "The cashier of an incorporated bank is regarded in law as its chief executive officer. He is in no sense the agent of the Board of Directors. He is a statutory officer, not of the directors, but of the corporation."

U. S. *vs.* City Bank, 21 How. (U. S.), 356, 364.

4 *Thompson, Corp.*, 5229: "The general rule, accordingly, is that the directors of a banking corporation are chargeable with notice of such matters, relating to the ordinary business of the bank, as are known to the cashier, and that such notice is imputed to the corporation itself."

Gould *vs.* Cayuga Co. Nat. Bank, 56 How. Pr., 505.
Tiffany *vs.* Boatman's Inst., 18 Wall., 375, 389.
Gadton *vs.* Am. Exch. Nat. Bk., 29 N. J. Eq., 98.

"Even where he is acting fraudulently as against a third party, his knowledge is imputable to the bank, providing he is acting for the bank, so as to charge the bank with damages, for the fraud, in favor of the third party.

Fishkill Sav. Inst. *vs.* Nat. Bank, 80 N. Y., 162.
Smith *vs.* Anderson, 57 Hun, 72.

Fishkill Sav. Inst. vs. *Nat. Bank of Fishkill*, 80 *N. Y.*, 162, was a case where the cashier of the de-

fendant bank was also treasurer of the plaintiff company. He took bonds of the company and pledged them for loans of the bank. In an action for conversion of the bonds, the defendant was held liable on the ground that the knowledge of the cashier was knowledge of the bank. The Court held:

"I do not think the case for plaintiff would be "any stronger if the actual concurrence of the "directors in the cashier's fraud was established. "If they were ignorant of it, it is because they "omitted the performance of official duty, and so "were not less bound than if the ignorance was in- "tentional, that they or the bank they represent "might profit by it. This the law will not tolerate "(Kennedy *vs.* Green, 3 M. & K., 699). There is, "indeed, evidence which permits an inference that "the president of the bank was informed of the use "being made of the bonds while they were in pledge "to the Merchants' Bank, and subsequently, and "in January, 1877, that the Board of Directors were "informed of the use which had been made of them, "through the banking firm, but they neither re- "stored them nor made compensation. This, how- "ever, need not be relied upon, for it is apparent "that the least degree of that diligence and care to "the exercise of which the directors of the bank "were bound by the simplest obligation of duty, "which would have disclosed to them the large out- "standing indebtedness of the bank, and the means "adopted by Bartow to carry it along. The defend- "ant should be treated as if they had made the in- "quiry and ascertained the fact (New Hope and "Delaware Bridge Co. *vs.* Phœnix Bank, 3 Comst., "156). Indeed, a direct resolution of the Board of "Directors, leading their cashier's steps in the di- "rection which they took, would be no more con- "vincing of their moral participation in the wrong "done than is the indifference and heedlessness to "their own duties, through which alone he was "able to perpetrate the fraud. He was the general

"manager of the bank; he was to see to its finances
"and look to and maintain its credit. Without
"these there could be no corporate existence.
"To secure and perpetuate this was the end
"pointed out; the means were left to his discretion.
"In such a case the principal is bound not only as to
"the end, but the means also."

Johnston *vs.* So. West R. R. Bank, 3 Strob. (So. Car.), 263.

Mackay *vs.* Commercial Bank, L. R., 5 P. C. App., 394.

Barwick *vs.* Eng. J. S. Bank, L. R., 2 Exc., 259.

Point III.

The transfer to the Bank of the goods in New York by Chaffee, the president of the Silk Company, was unauthorized and void;

For Chaffee had no right or authority, either as president or general manager of the Silk Company, without specific authority from the Board of Directors of the Silk Company, at a time when the Silk Company was insolvent and had stopped business, to create a preference in behalf of one particular creditor of the Silk Company chosen by himself, without the knowledge or consent of the Board of Directors of the Silk Company.

This proposition has been sustained in these very transactions of the Natchaug Silk Company by the Court of Appeals of Maryland in Hadden *vs.* Linville, 86 Md., 210, reaffirmed in 88 Md, 594; also by the Circuit Court of Appeals in Illinois in Dooley *v.* Pease, 88 Fed. Rep., 446, and by the Circuit Court of Appeals in New York in this decision appealed

from, and the grounds for such decision were in brief, that though Chaffee had power to pay the debt of a going concern, he had no power to prefer creditors by extraordinary means, when the company was about to be closed as insolvent.

We claim that, in the absence of special authority conferred upon Chaffee, either as president or general manager, for that purpose by the Board of Directors of the Silk Company, he had no power to make a preference in favor of the Bank, and the transfers of April 23, 1897, were and are void.

It might be that under such circumstances a preference could have been given to the Bank by the Board of Directors of the Silk Company, but as specific authority was not given to Chaffee, he had no authority either as president or general manager to make the transfer in question.

The owners of the property of the Silk Company were the stockholders, who act through the Board of Directors. The officers of the company are the agents with authority to act only in accordance with the powers actually conferred on them.

The by-laws of the Silk Company provided as to the duties of the president as follows (p. 63):

"The President shall preside at all meetings of "the stockholders of the Company, when present, "and in his absence the meeting shall be called to "order by the Secretary and a President *pro tem.* "appointed. He shall also perform all duties "specially required of him by the Statute Laws of "this State, but his charge of the executive busi- "ness of the Company shall be subject to the con- "trol of the directors."

The by-laws further provided as to the duties of manager:

"The Board of Directors shall annually elect a "General Manager, who shall have entire charge of "the business and affairs of said Company, subject

"to the order and approval of the Board of Di-
"rectors" (p. 64).

(It will also be noted that Chaffee had not been elected general manager of the Silk Company for two years prior to April, 1895.)

Thus the power of the president and general manager was made expressly subject to the control, order and approval of the Board of Directors. There is some testimony in the case to the effect that Chaffee was allowed to conduct the affairs of the company, *when a going concern*, as he pleased (Wilson's testimony), but the evidence does not sustain the broad claim of unlimited authority on Chaffee's part. The minutes of the directors of the company have been put in evidence, and it will appear upon an examination of them that there was not anything of importance, outside of the ordinary routine of business, that was not brought before the Board of Directors and passed upon by them.

The minutes show, in addition to the formal meetings for the organization of the company, for the purpose of increasing the capital stock thereof, for the election of officers and for the declaration of dividends, the following matters passed upon:

Aug. 27, 1888.	A committee was appointed to negotiate for the purchase of the business of O. S. Chaffee & Co. (p. 429).
Aug. 30, 1888.	Above committee reported, and it was voted to purchase the said business (p. 430).
Jan. 22, 1889.	The terms of such purchase were fixed. The salary of the president was fixed (p. 432).
Feb. 5, 1889.	Salary of treasurer was fixed (p. 441).
July 1, 1892.	Voted to join the American Protective League (p. 448).

Aug. 5, 1892. Question of securing additional office room was discussed and voted upon. Voted to accept demand note from Chaffee in settlement of his account with the company (p. 448).

Feb. 21, 1893. Voted to sell treasury stock to stockholders. Voted to make Morrison pay for his stock (p. 451).

July 7, 1893. Voted not to accept a policy in the Commercial Credit Company of Chicago (p. 452).

Jan. 27, 1894. Wages of employees reduced (p. 452).

Feb. 6, 1894. Action taken as to wages of employees, and threatened strike (p. 453).

Oct. 5, 1894. Action taken as to wages. Voted to purchase the Conantville Mill property (p. 453).

Oct. 11, 1894. Voted that the treasurer be authorized to execute a mortgage deed to the Willimantic Savings Institution, on the Conantville property (p. 454).

There is no evidence in the case that anything out of the routine line of business of the company was done by Chaffee without the action of the Board of Directors, except the bills of sale of January, 1890, and January, 1894, and April, 1895. These were secret (for they were fraudulent) and were not placed upon the minutes, and were not made known to the Board of Directors. Furthermore, Mr. Chaffee himself testifies that he did not manage the whole business of the company. He says: "I looked after the sales, but I did not look after the financial part of it at all" (Chaffee, fol. 1331). He testifies that Risley had charge of the financial part of the business (Chaffee, fol. 1330).

And it is to be noted that even as to the transfers of January, 1890, and January, 1894, Chaffee swears that Risley arranged these, too (fols. 1254, 1259): "Mr. Risley was negotiating this property and he "had to have this security" (fol. 1361). We quote from his testimony as follows (fol. 1330):

"Q. Mr. Risley died about the 12th day of April, " 1895? A. About that time.
"Q. And up to that time who had charge of the " financial end of your company? A. Mr. Risley.
"Q. You were general manager? A. Yes, sir.
"Q. Did you have charge of the books in your " office? A. Yes, sir.
"Q. Did you know the contents of the books in " general? A. No, sir.
"Q. You did not know the contents? A. I looked " after the sales, but I did not look after the finan- " cial part of it at all.
"Q. You did not look after the financial part of " it? A. No, sir.
"Q. Were you familiar with the Safeguard " Monthly Statement Book? A. No, sir.
"Q. Didn't you ever examine that to find out " how your company stood? A. I do not think I " ever did.
"Q. Wasn't it presented to you each month with " a statement of how your company stood? A. No, " sir.
"Q. Did you know, from month to month, how " your company stood? A. No, sir; not of my own " knowledge.
"Q. Did you get reports from your employees, " from month to month, as to how the company " stood? A. No, sir.
"Q. You swore to certain statements that were " put in to the Town Clerk and to Secretary of State " office? A. Yes.
"Q. Didn't you know whether they were correct " when signed? A. I supposed they were.
"Q. You supposed they were correct! A. Yes, " sir.
"Q. Did you ever compare them? A. No, sir.
"Q. Who made them out for you? A. The stock " was made up by Mr. Bissell, I think, and given to " Mr. Risley.
"Q. Who made out the amount of the debts? " A. He made them out.

"Q. Mr. Risley? A. Yes.
"Q. Who made out the amount of credits? A. "He made up the statements; the annual state- "ments.
"Q. Didn't you ever compare them to see if they "were correct? A. No, sir."

As to what the business of the Natchaug Silk Company was, and what power over it Chaffee ever exercised, we refer to the testimony of Wilson (fol. 208) and quote from it as follows:

"Q. What was the business of The Natchaug "Silk Company? A. Manufacturing dress goods, "fish lines, watch goods, sleeve linings, coat lin- "ings.
"Q. When the goods were manufactured, what "did the company do with them? A. Sold them.
"Q. Did they have various agencies throughout "the country? A. I understood so.
"Q. And the goods were sold to jobbers or con- "sumers? A. Both.
"Q. And that comprised the whole business of "the company? A. Yes, sir.
"Q. Prior to April 23, 1895, did you know of Mr. "Chaffee's disposing of any of the property of the "company outside of its regular course of business? "A. No, sir."

The records show no other powers conferred upon the president and general manager, and it cannot be said that the stockholders or directors intended thereby to confer upon the president and general manager the power in case of insolvency to convey away the assets of the corporation to such persons as he might desire to prefer.

The authority of the president and general manager was limited to acts done in conducting the business and affairs of the corporation as *a going concern*. There is no law nor custom that gives authority to the president and general manager to administer and divide the assets in case of insolvency and dissolution. In a certain sense the assets of an insolvent concern form a trust fund for the

creditors, and the directors, not the executive officers, are the trustees.

There is no longer any need or place for a business manager.

The transactions of April, 1895, were not transactions in the ordinary course of the business, nor were they made for the benefit of the Silk Company, or for its interests nor looking to the continuance and carrying on of its business.

They were made solely for the benefit of the Bank, and at its instigation and made in contemplation of the immediate insolvency and winding up of the company. A president and general manager had no authority to make such an unusual and extraordinary transaction.

This exact question was passed upon favorably to the contention of these complainants, by the Court of Appeals in Maryland (Hadden *v.* Linville, &c., reported in 86 Maryland, 210) in an attachment suit brought by these complainants against the goods which were transferred to Dooley in Baltimore, by Chaffee, during his trip in April, 1895, the complainant claiming that the goods still belonged to the Silk Company. The Court then, in the course of its opinion, said:

"The Natchaug Silk Company, organized originally as a joint stock association, was incorporated by the Legislature of Connecticut in 1889. Its business was the manufacturing and dealing in silk, leather, wool, or other substances composed wholly or in part of those materials, and to do such other things as are incident to that business. Chaffee was its president and general manager from the beginning. In the course of its business, it became a large borrower of the First National Bank of Willimantic. The record shows that its indebtedness on this account as far back as 1893, amounted to more than $285,000. It was enabled to secure this large credit with the Bank by reason of the fact, that the Silk Company's financial

" agent, Risley, was also the cashier of the Bank.
" It was this credit only that for several years en-
" abled it to maintain itself as a going concern. In
" fact it had not been solvent since 1890. Risley
" died on the 12th of April, 1895, and on the 22d of
" the month the Bank went into the hands of the
" Receiver; and by reason of these facts the prin-
" ciple, if not the only source of credit of the Silk
" Company, was entirely cut off. To Chaffee, as
" well as to all who knew the situation, it became
" evident that the Silk Company's affairs must also
" pass, at no distant period, into the hands of a re-
" ceiver. Under these circumstances Chaffee deter-
" mined to make an effort to secure the Bank by
" transferring to it the goods of his company held
" in the offices of its agents in New York, Chicago,
" St. Louis and Baltimore. Probably it was to make
" his action more effective, that shortly after Ris-
" ley's death, he forwarded goods of large value to
" New York, assigning as a reason therefor, that as
" he could get no more money from the Bank he
" would make arrangements elsewhere. Almost all
" the debts of the Silk Company were to become due
" on the twenty second of April, or within a few
" days thereafter. Chaffee seems to have kept his
" purpose strictly to himself. As he was about to
" start on his mission, he told Barrows the bookeeper
" 'if he needed any counsel in the matter to consult
" Perkins.' On 22d April, he proceeded to New
" York and transferred all the company's goods, in-
" cluding those he had sent there the week before,
" to the Bank, on account of his company's indebt-
" edness to the latter; thence he went to Chicago
" and Baltimore, and at each place made a transfer
" of all the goods held there thus placing all the
" property of the company outside of the State of
" Connecticut (so far as the record discloses) in the
" hands of the bank. It is obvious such transfers
" were not made in the usual course of business, but
" solely for the purpose of devoting all the assets
" within his control (a receiver having been ap-

" pointed for the company in Connecticut on the 26th
" April) to the discharge of the antecedent claim of
" the Bank; thus constituting, of his own will, the
" Bank a preference creditor of his insolvent com-
" pany. The twelfth by-law of the company, pro-
" vides for the election of a general manager ' who
" ' shall have entire charge of the business and
" ' affairs of said company, subject to the order and
" ' approval of the Board of Directors.' This by-law,
" by a reasonable construction, confers full power
" to do all things and make all contracts, that are
" needed in transacting the ordinary business of the
" corporation within the legitimate scope, objects
" and purposes of its organization; but not such
" authority as that he may deal at his own pleasure
" with the assets, outside the regular course of busi-
" ness. Nor does it appear from anything contained
" in the record, that Chaffee had ever arrogated to
" himself such extensive authority. Prior to the
" transaction in question, he had never undertaken
" to dispose of the property of the company, other-
" wise than in the regular course of business. This
" case, is clearly distinguishable from one where the
" managing officer has disposed of the property for
" the purpose of procuring credit for his company;
" there are cases where that is held to have been a
" proper exercise of his authority: Fay *vs.* Noble,
" 12 Cushing, 1; Lewis *vs.* Hartford Silk Co., 56
" Conn., 36; but with that question we are not now
" called upon to deal. In this case the transfer was
" for the purpose of securing or paying an antece-
" dent debt. Chaffee's authority under the by-law,
" and under that he was permitted to exercise in the
" management of the affairs of the company, was
" conferred upon him for the purpose of enabling
" him to properly and successfully conduct the busi-
" ness, to keep the company a going concern with
" capacity to earn a profit for its stockholders;
" not that he might, after the company became in-
" solvent and was about to go into the hands of a
" receiver, parcel out its assets or any portion of

" them among such of the creditors as his caprice
" or interest might lead him to select. An authority
" like this has never been accorded, as far as we are
" informed, to any officer charged with the conduct
" of the affairs of a corporation, whether he be
" called president, general manager or by any other
" name, unless there had been conferred upon him
" a prior express authority by the directors or stock-
" holders of the company."

This question was also passed upon, in the United States Circuit Court in Illinois, in a suit of conversion, brought by *Dooley as Receiver against the Sheriff of Cook County*, the Sheriff having seized, as the property of the Silk Company, certain of the goods attempted to be transferred in Chicago by Chaffee to the Bank. Judge Grosscup there held (Dooley *vs.* Pease, 79 Fed. Rep., 860; affirmed in 88 Fed. Rep., 446):

" The complainant is a receiver of a National
" Bank that had a large claim of over two hundred
" thousand dollars against a silk company in Con-
" necticut. The silk company itself was in financial
" difficulties and was about to fail. The president
" of the company, who was also its acting general
" manager, having been elected to that place some
" two or three years before and not having been re-
" elected, but continuing to act, came to Baltimore,
" Chicago and New York and executed a bill of sale
" of their stock of goods in these cities respectively
" to the receiver of the bank. He knew at the
" time that his silk company was on the point of
" failure, that an application would soon be made
" for the appointment of a receiver and it would go
" into the hands of a receiver.

" The circumstances are such that this discloses a
" clear case of an attempt upon the part of the presi-
" dent and acting general manager of a company
" that is no longer to be a going concern, but is to
" become and is already an insolvent concern, and

" is to become a defunct concern, to execute a pref-
" erence in favor of one of its creditors.

" I hold that in the absence of special authority
" conferred upon the president or general manager
" for that purpose by the directors, he has no power
" to make any such preference. The president and
" general manager has power to conduct the affairs
" of the company as a going concern, and do every-
" thing consistent with its affairs as a going con-
" cern, but when it comes to preferring creditors of
" a concern to be wound up, the owners of the prop-
" erty are the stockholders through their Board of
" Directors, and they have not by the mere election
" of a man to the presidency of the company au-
" thorized him to discriminate between their cred-
" itors."

Other authorities are equally in point, and seem conclusive.

In *First Nat. Bank* vs. *Company*, 116 *N. C.*, 827, the Court held that where the treasurer and general manager of a corporation engaged in the manufacture of furniture had general charge of the business, with power to sell goods, purchase material borrow money and pay debts, being pressed with demands for the payment of its debts, agreed with certain corporate creditors upon the value of certain lumber, and turned it over to them as part payment of their debts, such transaction was not within his powers, as his agency concerned the running and continuation of the business only, and not the preference of one creditor over another in a wind up of the corporate concerns.

Norton vs. *Alabama Bank*, 14 *South*, 872, was a case where the president and general manager of a corporation made an assignment for the benefit of creditors, without authorization by the Board of Directors which was composed of three persons, the president himself, his wife and his brother. Before

making the assignment the said general manager told his wife that unless he could borrow money that day, he would be compelled to make a sale or assignment, and she replied, "Do the best you can." The Court held that the assignment was invalid, saying: "It is a generally recognized principle of "law that the president of a corporation or its gen- "eral manager without authority of its Board of "Directors, cannot make a valid conveyance or as- "signment of the property of the corporation."

The Court also held that a subsequent ratification by the Board of Directors was inoperative against an intervening attaching creditor.

Goodyear Rubber Co. vs. *G. D. Scott Co.*, 96 *Ala.*, 439, 443, was a case where a manager and one of the officers of a company in consideration of a precedent debt, without authority or sanction of the Board of Directors, when the company was insolvent, conveyed property of the company to a bank. The Court held: "If this be so, the sale did not vest "good title in the bank. Sales of this kind could "be made only by the Board of Directors and not "every sale by them would be valid" (Cook on Stock and Stockholders, Sec, 712; 1 Morawetz Corp., Secs. 511-12-13. Dana *vs.* Bank U. S., 5; Watts *vs.* Serg., 223; Beach Priv. Corp., 241).

In Nat. Bank vs. *Vigo Bank*, 141 *Ind.*, 352, it was held that the president of a corporation has no power to transfer the property of the corporation by way of preference to a creditor on a pre-existing debt.

Thomps. Corp., Sec. 4622:

The president of a corporation has no power "to confess a judgment against a corporation" (Stokes *vs.* N. J. P. Co., 46 N. J. L., 237; Adams *vs.* Cross, 27 Ill. App., 313), or under any theory "of his "powers to alien the corporate property, except in "the ordinary course of business" (Hollowell *vs.*

Hamlin, 14 Mass., 178; Walworth Bank *vs.* Farmers' L. & T. C., 14 Wisc., 325); "or borrow money "in the name of the corporation, and pledge its re- "sponsibility therefor or assign its assets as security "therefor" (Life Ins. Co. *vs.* M. F. I. Co., 7 Wend., 31; Hyde *vs.* Larkin, 35 Mo. App., 365).

4 *Thomp. Corp. Sec.* 4618:

The authority of a president of a corporation is only that "of its general agent, for the purpose of "binding it by contracts made within the ordinary "scope of its business."

4 *Thomp. Corp., Sec.*, 4627:

"But even when exercising the powers of gen- "eral manager of the business of the corporation, "the president can act only upon matters arising "in the ordinary course of business of the corpora- "tion."

4 *Thomp. Corp., Sec.* 4632:

"The widest theory of the *ex officio* or implied "powers of the president of a corporation extends "no further than to ascribe to him the power to "sell or otherwise dispose of its property in the "ordinary course of business."

"Under no theory of the implied or *ex officio* "powers of the president of a corporation can he "assign, mortgage or otherwise dispose of its prop- "erty, for the payment of its debts, since this is not "a disposition of it in the ordinary course of its "business. * * *

"Unless specially authorized by the charter, the "president and cashier of a bank have no power to "assign, the choses in action of the corporation to "its creditor, as security for the payment of the "precedent debt of the corporation, without au- "thority from the Board of Directors. Such an au- "thority, it has been said, only emanates from the "stockholders of the company directly, or indi-

" rectly from the directors, to whom, by the by-
" laws, is committed the management of the affairs
" of the company, but in either case it must be ap-
" proved by a vote of one or the other of these
" bodies."

Comacho vs. *Hamilton Bank Note Co.*, 2 *App. Div.*, 369, defined the duties of general manager as follows:

" That the words 'general manager' would im-
" port that the person bearing the title is a general
" executive officer for all the ordinary business of
" the corporation, is all that may properly be in-
" ferred, and this would justify, in connection with
" proof of acts done, a conclusion that all ordinary
" contracts, made by such official, are authorized
" by the corporation. But no presumption of law
" can be indulged in that, because a person acts as
" such a manager, he has the power to bind his
" principal to contracts of an extraordinary nature
" and of such a character as would involve the cor-
" poration in enormous obligations and for long
" periods of time."

The case held that a general manager had no right to make a three-year contract of employment.

Hoyt vs. *Thompson*, 5 *N. Y.*, 320, 324, held, in a case where the president and cashier of a banking company assigned a chose in action of the company to a creditor as security for a precedent debt of the corporation:

" But the power and duties of the president and
" cashier are not prescribed by the charter; no
" power is conferred upon them to mortgage, assign
" or dispose of the property of the corporation.
" This is a part of the management of the concerns
" of the company which is confided expressly to the
" directors, but not to the president and cashier. In
" no case has it been held that these officers have

"the power to do an act like that in question with-
"out the assent and authority of the directors."

Hyde vs. *Larkin*, 35 *Mo. App.*, 365, 371, the Court held in a case where the president and general manager of a company assigned a chose in action of the company to a creditor as security for a debt:

"I am firmly persuaded that the president, general
"agent or manager of a mining corporation can-
"not by virtue of his office, merely assign the as-
"sets of the corporation. He must have some war-
"rant from the charter, the directory or the custom
"and usage of the corporation. It is certainly the
"safer and more conservative rule, and commends
"itself to sound reason. If it were not so, such
"officer might act in disregard of the Board of Di-
"rectors, and might, by the mere power inherent in
"his office, transfer the entire assets of the corpora-
"tion. The proposition is supported by the weight
"of authority." Citing Whitewell *vs.* Warner, 29 Vt., 425; C. & N. W. R. R. *vs.* James, 22 Wisc., 194, 198; Stow *vs.* Wise, 7 Conn., 214; Sherman *vs.* Fitch, 98 Mass., 59; Lydenborough G. Co. *vs.* Mass. Glass Co., 111 Mass., 315; Kraft *vs.* F. P. Co., 87 N. Y., 628; Asher *vs.* Sutton, 31 Kans., 286; Walworth *vs.* F. L. & T. Co., 14 Wisc., 325; Hoyt *vs.* Thompson, 1 Seld., 320; Despatch L. of P. *vs.* Mfg. Co., 12 N. H., 205, 228, and not following McKernan *vs.* Lenzen 56 Cal., 61.

Luse vs. *Isthmus T. R. Co.*, 6 *Ore.*, 125, held that the president and general manager of a railway company had no authority to mortgage the personal property of the company to secure its debts.

Walworth, &c., Bank vs. *Farmers' L. & T. Co.*, 14 *Wisc.*, 325, held that a president of a railroad company had no authority to sell railroad ties as part payment of a debt of the company. The Court held:

"But we do not think that he (the president) can "by virtue of the power inherent in his office, dis- "pose of the personal property of the corporation "for any purpose at his pleasure without special "authority from Board of Directors."

England vs. *Dearborn*, 141 *Mass.*, 590, was a case where a mortgage of all the personal property of a manufacturing corporation, except its book accounts, given by the president and treasurer to secure a pre existent debt, was held to be invalid; though the president and treasurer was also general manager and owned all but two shares of the capital stock.

The Court held that such a transaction "cannot "be one of the ordinary incidents of carrying on the "business of a manufacturing corporation. The ex- "tent of the judicial knowledge which Courts have "taken of the customary powers of different officers "of corporations need not be discussed, for it can- "not be held to be within the implied powers of "any officer of a manufacturing corporation to "convey away all its property, except its book ac- "counts."

It is claimed that the case of *Lewis* vs. *Hartford Silk Co.*, 56 *Conn.*, 25, holds a contrary doctrine.

But the Lewis case was one where the president and unlimited general and financial manager of a corporation, owning with his personal family all the stock of the corporation, with no limitation whatsoever upon his power, no meeting of the Board of Directors having been held for five years, borrowed money in the ordinary course of business to keep the concern going, and as security for such advances pledged the goods of the company. As the company received the money and used it in its business, the Court held that the company could not question the authority of the president and general manager to make such pledge.

The case is very different from the case at bar, in that Chaffee was not unlimited general manager,

and furthermore the transfer in qnestion was not made to keep the Silk Company going, but was made in contemplation of insolvency to secure a past debt, and was made in continuance of a fraudulent conspiracy with the creditor sought to be preferred.

Furthermore, the Bank as well as Dooley knew of the limitations of Chaffee's power.

Risley and Fowler were both directors in the Silk Company and the Bank, and in view of the close relations of the Silk Company and the Bank, their knowledge of the by-laws of the Silk Company was certainly the knowledge of Bank, and moreover Risley, the cashier of the Bank, was also the financial manager of the Silk Company.

That Chaffee's lack of authority was perfectly well known to the Bank authorities is proved beyond a question by the events of April 29, 1895 (Wilson, fols. 65-68; Fenton, fols. 118-120).

Immediately upon his return to Willimantic Chaffee called a meeting of the Board of Directors, for the express purpose of getting them to ratify these transfers to the Bank.

Fenton, Fowler, Wilson were there, also Mr. Dooley and Mr. Lucas. Wilson states as to what happened: "Mr. Dooley stated the purpose of call-"ing us together was to ratify the action of Mr. "Chaffee in making preferences to the First Na-"tional Bank of Willimantic" (fol. 196). Mr. Lucas stated that such ratification "was very im-"portant" (fol. 199). That Dooley and Lucas were equally persistent about the matter, and that "both "of them were anxious" (fol. 199).

Mr. Wilson and all the other directors refused absolutely to ratify these transfers (fol. 200).

The whole purpose and method of the Pangburn suit, and the attachments levied on these very goods by Dooley in his own and in the Pangburn suit against the Silk Company as the goods of the Silk Company, show beyond doubt Dooley's knowledge of lack of authority on the part of Chaffee.

Moreover, the proof claim (fols. 1699-1700) filed with the Receiver of the Silk Company by Dooley as Receiver, gives no credit to the Silk Company for the goods claimed to have been transferred to the Bank in payment of part of the Bank's claim.

IT IS, THEREFORE, INSISTED THAT, INDEPENDENTLY OF THE FRAUDULENT SCHEME AS HEREIN SET FORTH, THIS TRANSFER OF CHAFFEE WAS INEFFECTUAL TO TRANSFER TO DOOLEY AS RECEIVER ON THE BANK THE TITLE TO THE PROPERTY IN QUESTION.

The claim is unsound that the transfer was subsequently ratified by the directors, by reason of the fact that after the meeting of April 29, 1895, they took no proceedings to disaffirm or upset this transfer. At that meeting, as has been seen, the Board of Directors refused to ratify the transfers (fol. 200).

By the appointment of a Receiver all corporate action on the part of the directors, with relation to the property of the company, was suspended.

Beach on Receivers (Ald. Ed.), pp. 194, 466, 468.

High on Receivers, § 289.

Gluck & Becker on Receivers (2d Ed.), p. 9.

Sec. 1322 Gen. Stat. of Conn.

Rochester *v.* Bronson, 41 How. Pr. (New York), 82.

Louisville R. R. *v.* Cauble, 46 Ind., 277, 280.

Lenoir *v.* Improvement Co., 117 N. Car., 471, 475.

Franzen *v.* Simmer, 90 Hun, 107.

As was said by the Court of Appeals of Maryland, in Linville *vs.* Hadden, 88 Md., 594, "Even if the "Board of Directors had attempted after the ap- "pointment of the Receiver to ratify the act of Mr. "Chaffee in transferring the property of the Silk "Company to the garnishee, or to any other cred-

"itor, their action would have been futile. For it is "text book law, 'That the appointment of a Re- "'ceiver over a corporation is generally equivalent "'to a suspension of its corporate function, and of "'all authority over its property and effects, and is "'also equivalent to an injunction restraining its "'agents and officers from intermeddling with its "'property (High on Receivers, Sec. 290). This "'must necessarily be so—otherwise both the Re- "'ceiver and the Board of Directors would be com- "'petent to exercise the rights, privileges and fran- "'chises of the corporation, and endless confusion "'would be the result. * * * The evidence "'offered to show that the Directors of the Com- "'pany acquiesced in it or ratified it after they "'ceased to have any power to act * * * was "'clearly inadmissible.'"

Point IV.

The Pangburn judgment and the proceedings thereunder ought to be held for naught, because—

FIRST.—Pangburn was an assignee of the Bank without consideration. He is not an innocent holder for value, and, therefore, stands precisely in the shoes of the Bank and its Receiver. He is, therefore, precluded from enforcing any remedy against the property in question for the reasons heretofore shown.

SECOND.—He was in fact merely a tool and cat's-paw for Dooley and his proceedings were taken under Dooley's direction and for the benefit of the Bank. His proceedings were taken and carried on by means of misrepresentations to the Court, and by abuse of the processes of the courts for a fraudulent end.

THIRD.—His claim is not a just and valid claim against the Natchaug Silk Company.

We rehearse the following facts to impress upon the Court the "element of unfair dealing which entered into the conduct of the plaintiff," which would "vitiate that attachment against subsequent "attaching creditors" (see fol. 717 of Judge Shipman's opinion); and in order that this Court, when considering the validity of the Pangburn notes, may judge whether it should exercise in any way its equitable jurisdiction to establish a doubtful claim, which was made use of fraudulently and to defraud.

It will not be necessary to repeat the prior proceedings, including the secret transfer to New York of the goods in Willimantic and Boston, by which the Bank tried to perfect a lien on the goods in question.

On April 23 and 24, 1895, we find the goods in question in the store of D. E. Adams, at No. 77 Greene street, in charge of Thompson, the agent of the Silk Company.

On April 29, 1895, a warrant of attachment was issued to the Sheriff of New York County, in the suit of Morimura, Arai & Company against the Natchaug Silk Company. The Deputy Sheriff served the warrant on John H. Thompson, the manager of the Silk Company, but did not take actual possession of the good in question, as Thompson told him that he had no property of any kind in the store belonging to the Natchaug Silk Company (Ferguson, fol. 605). But on May 2, 1895, sixty-two cases of these silk goods in the store at 77 Greene street, were removed and stored in the warehouse of F. C. Linde & Co., in New York City, in the name of Edward Winslow Paige, Dooley's attorney, and remained there until the 18th day of May, 1895, when, on Paige's orders, they were again removed to the Brooklyn Storage and Warehouse Company, in Brooklyn, where they were also stored

in the name of Edward Winslow Paige (Linde, fol. 520).

On said 18th day of May, Paige had commenced a suit in the Supreme Court of New York, in the County of Schenectady, entitled Michael F. Dooley, as Receiver, &c., against the Natchaug Silk Company, for the amount of $76,922.63, and, on affidavits showing that the Silk Company was a foreign corporation, he obtained an attachment against the goods of the Natchaug Silk Company. On the 18th of May a warrant was issued to the Sheriff of Kings County, and under Mr. Paige's directions the Deputy Sheriff attached the goods in the Brooklyn warehouse as the goods of the Natchaug Silk Company (Bradley, pp. 193-197). Paige had previously arranged with Mr. Wayne, the manager of the warehouse, to allow the Sheriff to attach these goods (Wayne, fol. 508).

On the 16th day of May, 1895, Ignatius Rice commenced suit against the Silk Company, obtained an attachment, and the Sheriff, under the warrant, on the 18th of May (Saturday), placed a man in charge of the goods at 77 Greene street (Whoriskey, fols. 612-614), but subsequently withdrew him, as Thompson said he had no property of the Silk Company.

On the 21st day of May, 1895, these complainants began a suit in the Supreme Court of New York, against the Natchaug Silk Company for $22,776.59; an attachment was obtained and a warrant issued to the Sheriff of New York County. The Deputy Sheriff at once went to the office of the Silk Company at 77 Greene street and served the warrant on said John H. Thompson, but refused to take the goods until a bond was given to protect him. This was given as soon as possible, but in the meantime, and on the 25th of May, forty-three boxes of silk were removed under Paige's orders (Thompson, fols. 540, 541), and placed in the Brooklyn warehouse in the name of Edward Winslow Paige (Wayne, fol. 510), and these goods, shortly after, were also levied on by the Sheriff, in the Dooley suit by Paige's di-

rections. After these levies had been made, and on May 27, 1895, he orders these goods to be transferred from his name to that of Michael F. Dooley, Receiver of the First National Bank of Willimantic, and the attachment stands levied by Dooley, as Receiver on goods which he claimed to be owner of as Receiver, and which were stored in his name.

It is evident that Dooley or his counsel were aware of the fact that the courts had no jurisdiction to issue an attachment in Dooley's case.

At this point, therefore, a new scheme was devised by Mr. Paige, the attorney for Dooley. It proceeded in this way: On May 31, 1895, Dooley signed a petition in Willimantic for leave to sell certain notes of the Silk Company (hereinafter set forth) in his hands as Receiver of the Bank, to John A. Pangburn of Schenectady, for $200. A schedule and description of the notes was set forth in the petition. They amounted to $67,594.66. The reason why the Court was asked to allow the sale of notes to that amount for $200 is stated in the petition to be that the notes were "doubtful debts" (Exhibit 51, fol. 887). At the time Dooley made this petition, he knew that the Silk Company would pay fifty per cent. of the claim (fol. 428) or about $30,000. The petition was therefore false and known to be false, unless, as a matter of fact, the notes had been superceded, and no longer a valid claim against the Silk Company, as the complainants contend. This petition was presented to the Circuit Judge of this Circuit, and upon it an order was obtained *ex parte*, permitting such sale to be made. On the first day of June Dooley executed in Hartford an assignment of said notes to Pangburn, and on the same day a suit was brought in which Pangburn is named as plaintiff, against the Natchaug Silk Company, the venue being laid in Schenectady County, and an attachment issued against the Natchaug Silk Company for $67,594.66. This attachment was sent to the Sheriff of Kings County, and on the 3d day of June was levied by the direction

of Mr. Paige, the attorney of Dooley, who, in this matter, appeared also as the attorney of Pangburn, on the goods stored in the Brooklyn warehouse, at that time standing in the name of either Paige or his client Dooley. A judgment was entered for want of answer, and the Sheriff gave a notice that he would sell the goods under execution issued upon the judgment of July 5, 1895. So the goods which Dooley claimed to own were to be sold under an execution issued in favor of Pangburn and running against the property of the Natchaug Silk Company, all being done under the direction of Paige, Dooley's attorney. No one will doubt that this suit of Pangburn was really brought in the interest of Dooley. Just here attention is called to the fact that on June 21st, application was made to the Court upon an affidavit of Dooley (Exhibit 51, fol. 895), for a confirmation of the sale of the notes to Pangburn. In this affidavit Dooley states that on the 1st day of June he executed the assignment to Pangburn, and he proceeds to say: "I received from "him on that day the sum of $200 as the purchase "price of the same," and upon this affidavit the Court made an order confirming the sale. As a matter of fact, Dooley never saw Pangburn; never had any communication with him; never did receive $200, or any other sum from him, and the statement in his affidavit is untrue (Dooley, fol. 411). Dooley, however, says that at some time—but the time is not disclosed—Paige wrote him that he (Paige) had received $200, and to charge it to his (Paige's) account. It will appear further on that Paige did not receive a dollar from Pangburn. Just what took place between Paige and Pangburn is stated in a deposition of Pangburn (Exhibit C, May 21st, pp. 329-333). It appears that Paige went to Schenectady, saw Pangburn and told him in substance that he wanted to sell him some notes, put the notes in his hands, and possibly the assignment, but immediately took them back, and Pangburn has never had the notes nor anything to show his title to them or interest in them since that interview.

However, Pangburn immediately went and swore to the necessary affidavit to get an attachment, and allowed Paige to bring a suit in his name. We quote from Pangburn's testimony the following (fol. 992):

"I know of a man named Dooley; never saw him; "don't know where he lives. I have had notes "assigned to me, but don't know when it was; "they were assigned to me through E. Winslow "Paige. I had a written assignment of them, and "the notes in my hands; I had them only a few "minutes, then I handed them to Mr. E. Winslow "Paige; I got them from him. * * * I simply "handed them back to him. * * * I don't "know what became of the notes, and have not "seen them since. I paid no money for them. "* * * The whole matter he wanted to use my "name, and I let him, with the understanding that "if there was anything in it I was to get something "out of it. * * * I don't know what my inter-"est in the judgment is worth. I think, and have "thought, that there was nothing in it for me."

It will be seen from this that the notes remained in the hands of Dooley, or Paige, his attorney, all the time, and it appears that the so-called assignment to Pangburn was not in reality delivered to him, but only put in his hands for a moment, and then taken back and kept by Paige. Paige was acting all this time for Dooley, and he was, as Pangburn supposed, merely using Pangburn's name for Dooley's benefit.

There has never been any pretense on the arguments in this case that Pangburn was acting for any one but Dooley, and Dooley himself is forced to admit that in making affidavits which were used to sustain Pangburn's attachment, he did it *to protect his own interest* as Receiver of the First National Bank (fol. 431).

Notwithstanding these facts, which cannot be disputed, Dooley's sworn answer in this case contains the following (fols. 1208, 1209, 1212):

"He denies that the said suit was brought by this "respondent in said Pangburn's name, and as a "part and parcel of a fraudulent scheme by which "respondent or anybody seeks to establish any "fraudulent title to or gain possession of the prop- "erty of the Natchaug Silk Company in New York, "the proceeds thereof, and to hinder and delay the "creditors of said company.

"He denies any knowledge or information suf- "ficient to form a belief as to whether the said "Pangburn has no interest in the result of the said "suit, and he denies that said Pangburn is merely "the tool of this respondent.

"He admits that the attorney by whom the said "Pangburn's suit was brought is the same human "being as the attorney by whom this respondent's "suit was brought, but he denies that that human "being, in bringing and conducting said Pangburn's "suit, acted in any way as the attorney of this re- "spondent."

It is further to be noted that Dooley as Examiner had examined the Bank in January, 1894, and had been party to the fraudulent bills of sale of January 13 and 15, 1894. He undobtedly knew at that time that the debt of the Silk Company to the Bank was over $220,000 (see statement from books of Bank, fol. 1037), and yet permitted the Bank to go on. If Dooley had done his duty, no sales would ever have been made by these plaintiffs to the Silk Company.

It is respectfully submitted that this court of equity will not permit a scheme of fraud, lying and deceit, as disclosed by the foregoing facts to avail as against the just claims of these complainants.

By a false claim of Dooley's title, the complainants are prevented from levying on the goods in question just long enough to enable the attorney for Dooley to secretly transfer the goods to Brooklyn, where they remain undiscovered for just a long enough time to enable Dooley to make a pretended sale to Pangburn of pretended obligations of the Silk Company (the confirmation of such sale being

obtained by Dooley by an affidavit false in fact), and to enable Dooley's attorney to get an attachment on these goods in the Pangburn suit; Dooley then swears to a false answer, but continues to aid the Pangburn attachment on goods standing in his (Dooley's) own name, by affidavits and every other means in his power, including the services of his own attorney.

It was a most barefaced proceeding, and, irrespective of all other considerations in this case, it should be sufficient to warrant this Court in disregarding all proceedings and all claim made in the name of Pangburn.

THE COMPLAINANTS CONTEND THAT THE NOTES SUED ON IN THE NAME OF PANGBURN WERE NOT DEBTS OF THE SILK COMPANY AT ALL, THEY WERE NOT VALID OBLIGATIONS AND DID NOT REPRESENT ANY CLAIM AGAINST THE SILK COMPANY, AND THAT IN SUCH A CASE EQUITY WILL NOT INTERFERE TO HELP A FRAUDULENT SCHEME, WHERE THE SUIT MIGHT HAVE BEEN DEFEATED BY THE DEBTOR HIMSELF (see opinion of Judge Shipman, p. 714).

The utter and complete fraud of the Pangburn suit is not fully revealed, however, until the nature of the alleged obligations transferred by Dooley to Pangburn is shown.

The scheme was simply this: Dooley picked out a lot of old renewal notes, most of which had been superseded by numerous other renewals, and the rest of which were of doubtful validity, and transferred them to Pangburn. As none of these notes would appear as outstanding obligations on the Silk Company's books, Dooley could collect in the Pangburn suit and still prove his full claim against the Silk Company. Dooley thought that no question as to these notes could be made by the creditors of the Silk Company

and that no question would be raised by the Silk Company, and he makes an erroneous affidavit that the credits of these notes "are shown by the pass "books of the Natchaug Silk Company" (fol. 435). But when question was about to be raised by the Receiver of the Silk Company and an answer interposed in the Pangburn suit, he choked him off by an *ex parte* order of the Connecticut court (Exh., pp. 263, 264). When the question was really seriously raised by the New York creditors, then Dooley attempts to help himself out by sending to Paige, his attorney, all the subsequent renewals of the Pangburn notes, "with directions to deliver to Mr. "Pangburn" (?). As a matter of fact, Pangburn never saw or knew of these notes, which were kept by Paige, Dooley's attorney.

Moreover, what Dooley sold was the Pangburn *notes* themselves only (Petition for Leave to Sell, Exh. 51, fols. 885-887), not the *claim*, and the order of the Court allowed the sale of just these notes and nothing else (fols. 890-892), and the validity of these particular notes must be the sole question to be considered.

Not one of the Pangborn notes except Nos. 13 and 14 (fols. 1524, 1528) appears on the schedule of outstanding obligations of the Silk Company made by the Receiver of the Silk Company.

The Receiver reported (Schedule G, p. 475) a note indebtedness to the bank of $339,232.13.

Prior to the examination of the books of the bank, in April, 1897, the Receiver of the bank ingenuously adopts apparently the statement of the Receiver of the Silk Company, and puts in a proof of claim of $327,926.29, including the Pangburn claim and excluding a claim of $44,500 on stockholders' notes, but an examination of the discount register of the Bank (pp. 564-579) and the Bank journal (pp. 574-579) discloses the fact that *only* $205,082.66 of discounted notes remained unpaid, including the Pangburn renewal notes, and no trace can be found in the books of the Bank of notes amounting to $62,012.51, included in

the Receiver's Schedule G (p. 475), being notes of December 15, 1894, for $1,000; December 20, 1894, $5,000; December 20, 1894, $2,000; January 12, 1895, $5,992.63; January 10, 1895, $5,000; March 9, 1895, $5,000, and the last fifteen notes set forth in said schedule.

The Receiver of the Bank, after this showing, tried to prove other notes as an indebtedness of the Silk Company to the Bank, but the proof was wholly incompetent, and even if admitted would only add $58,750 to the indebtedness of the Silk Company, making a total of $263,082 *instead of* $327,926.27 attempted to be proved by Bank against the Silk Company (see Proof of Claim, p. 534), making a difference about equal to the total Pangburn claim of $67,594 66. In other words, Mr. Dooley seeks to prove against the Silk Company the total indebtedness to the Bank, and at the same time, by a jugglery of accounts, seeks to recover, in the Pangburn suit, on some of exactly the same indebtedness.

The following is the list of the fifteen notes assigned to Pangburn:

1.	Jan.	9, 1894,	4 mos	$5,000 00
2.	"	9, 1894,	"	5,000 00
3.	"	12, 1894,	"	5,000 00
4.	"	12, 1894,	"	5,000 00
5.	"	16, 1894,	"	5,000 00
6.	"	16, 1894,	"	5,000 00
7.	"	18, 1894,	"	2,500 00
8.	"	19, 1894,	"	5,000 00
9.	"	26, 1894,	"	5,000 00
10.	"	26, 1894,	"	5,000 00
11.	"	29, 1894,	"	5,000 00
12.	"	29, 1894,	"	5,922 63
13.	Dec.	15, 1894,	"	1,000 00
14.	Jan.	12, 1895,	3 mos	5,922 63
15.	Jan.	26, 1895,	O. S. Chaffee	2,250 02

All of these Pangburn notes are renewals of renewals and not the *original* obligations, as Judge Shipman seems to assume (p. 714), and ten Pangburn notes have themselves been superseded by renewals. The following table will assist:

ORIGINAL NOTES AND PRIOR RENEWALS.

Aug. 27, '92 (Ex. 10); Dec. 30, '92; May 3, '93; Sept. 6, '93.....

Aug. 27, '92 (Ex. 10); " " " " " " " " " ".....

Jan. 3, '93 (Ex. 9); May 6, '93; Sept. 9, '93.....

Jan. 3, '93 (Ex. 9); " " " " " " .....

Jan. 7, '93; May 10, '93; Sept. 13, '93 .....

Jan. 7, '93; " " " " " " .....

Dec. 23, '90; April 25, '91; Aug. 28, '91; Dec. 31, '91; May 3, '92; Sept. 6, '92; Jan. 9, '93; May 1

Dec. 24, '90; Apl. 28, '91; Aug. 31, '91 (Ex. 26); Jan. 2, '92 (Ex. 27); May 5, '92 (Ex. 28); Sept. 8
11, '93 (Ex. 30); May 13, '93; Sept. 16, '93 .....

April 26, '90 (Ex. 20); Aug. 29, '90 (Ex. 21); Dec. 30, '90 (Ex. 22); May 2, '91; Sept. 5, '91; Jan. 8
11, '92 (Ex. 24); Sept. 14, '92 (Ex. 25); Jan. 17, '93 (Ex. 18); May 20, '93 (Ex. 19); Sept. 23, '9

Aug. 29, '90 (Ex. 11); Dec. 30, '90 (Ex. 12); May 2, '91 (Ex. 13); Sept. 5, '91 (Ex. 14); Jan. 8, '9
'92 (Ex. 16); Sept. 14, '92 (Ex. 17); Jan. 17, '93; May 20, '93; Sept. 23, '93.....

Jan. 3, '91; May 6, '91; Sept. 9, '91; Jan. 12, '92; May 14, '92; Sept. 17, '92; Jan. 20, '93; May 23,

Sept. 9, '91; Jan. 12, '92; May 14, '92; Sept. 17, '92; Jan. 20, '93; May 23, '93; Sept. 26, '93.....

Nov. 20, '91; Mch. 23, '92; July 26, '92; Nov. 29, '92; April 1, '93; Aug. 4, '93; Dec. 7, '93; April
(N. B.—Of these were deposited in Court all except Jan. 7, '93, of Nos. 5 and 6; Dec. 23, '90,
of No. 8; first 10 notes of No, 9; first 7 notes of No. 10; and the whole series of No. 13).

Mch. 15, '92 (Ex. 63); June 18, '92 (Ex. 64); Sept. 20, '92 (Ex. 65); Dec. 23, '92; Mch. 25, '93; June 2
Jan. 2, '94; Apl. 5, '94; July 7, '94; Oct. 10, '94 (Ex. 66).....

Aug. 20, '90; Dec. 23, '90; Apl. 25, '91; Aug. 28, '91; Dec. 31, '91; May 3, '92; Sept. 6, '92; Jan.
Sept. 15, '93; Jan. 18, '94; May 20, '94; Sept. 24, '94.....

	PANGBURN NOTES.				SUBSEQUENT RENEWALS.
	No.	Amount.		Date.	
....	1	$5,000 00	4 mos.	Jan. 9, '94	May 12, '94; Aug. 11, '94; Jan. 10, '95
.....	2	5,000 00	"	" " "	" " " " " " " " "
.....	3	5,000 00	"	Jan. 12, '94	(Pd. May 31, '94, pg. 629)
....	4	5,000 00	"	" " "	" " " " "
....	5	5,000 00	"	Jan. 16, '94	May 19, '94; Sept. 22, '94; Jan. 25, '95 (Ex. V)
.....	6	5,000 00	"	" " "	" " " " " " " " " (Ex. AA)
'93; Sept. 15, '93..	7	2,500 00	"	Jan. 18, '94	May 21, '94; Sept. 24, '94; Jan. 26, '95 (Ex. KK)
'92 (Ex. 29); Jan.	8	5,000 00	"	Jan. 19, '94	May 22, '94; Sept. 25, '94; Jan. 28, '95 (Ex. QQ)
92 (Ex. 23); May	9	5,000 00	"	Jan. 26, '94	May 29, '94; Oct. 2, '94; Feb. 5, '95 (Ex. 22)
Ex. 15); May 11, ...	10	5,000 00	" ..	Jan. 26, '94	May 29, '94; Oct. 2, '94; Feb. 5, '95
; Sept. 26, '93.....	11	5,000 00	"	Jan. 29, '94	June 1, '94; Oct. 4, '94; Feb. 7, '95
.....	12	5,922 63	"	Jan. 29, '94	June 1, '94; Oct. 4, '94; Feb. 7, '95
'94; Aug. 18, '94.. No. 7; first 5 notes	13	1,000 00	"	Dec. 15, '94	
'93; Sept. 30, '93;	14	5,922 63	3 "	Jan. 12, '95	
'93: May 12, '93;	15	2,250 00	4 "	Jan. 26, '95 (O. S. Chaffee note).	

On the note book of the Silk Company each renewal, except the last, is marked "Paid"; and it will be noted that at the time that the Pangburn suit was begun (June 1, 1893) the last renewals of Pangburn notes, Nos. 8, 9, 10, 11 and 12, amounting to $25,922.63, had not become payable, and could not have been sued on.

On reference to the Bank pass book of the Silk Company, there is no entry of the discount of the Pangburn notes Nos. 1 to 12, and there is also no entry of any discount of these notes in the Discount Register of the Bank.

The only note of a date corresponding to these Pangburn notes in said pass book is that of "Jan. 16, 94, 4 mos., $5,000" (fol. 296). But this note appears as a returned voucher on stub of check book, under date of June 26, 1894 (see Schedule C of Exh. A, Mch. 26, fol. 1562). The Bank, therefore, could not have it, and furthermore, the note book (page 467) shows that three notes of January 16, 1894, were made by the Silk Company to the Bank. This discounted note must, therefore, have been the third note, and not either Nos. 5 or 6 of above table.

Mr. Hayden, Receiver of the Silk Company, testified that, other than the aforesaid entry of the note of January 16, 1894, he found nothing at all in the pass book with reference to the discount of these Pangburn notes Nos. 1–12 (fols. 291, 292).

Barrows, the bookkeeper of the Silk Company, testified (fol. 245) that when Risley "discounted a note he put it in the pass book" of the Silk Company; "entered the note less the discount"; that he or his clerks did that with *every* note that the Silk Company received the proceeds of.

It follows that none of the Pangburn notes, Nos. 1–12, were discounted to the Silk Company by the Bank.

To take up the notes seriatim:

Nos. 1 and 2, January 9, 1894. None of the series notes (Series Schedule) appear on the Discount Register of the Bank, and there is nothing to show

that the Silk Company ever received any of the avails of these notes, in spite of the fact that the notes of August 27, 1892, appear to have been discounted for the Bank, and taken up by the Bank at maturity (Deft.'s Exh. 10, p. 630). The entry on the deposit ledger of the Bank was not properly proved by the person who made it, and is incompetent for any purpose to establish any debt against the Silk Company in the absence of any proof of the receipt by the Silk Company of the money.

Dykman, Receiver of the Commercial Bank, *vs* Northbridge, 80 Hun, 258, held:

"Under the pleadings it was essential to the "plaintiff's recovery that he should prove that the "Bank was a holder for value, and this he at- "tempted to do by the production of the Bank's "books and reading in evidence various entries in "reference to the note. * * * The entries in the "Bank's books were not admissible as proof of pay- "ment, and the objection thereto was well taken. "But the entries did not prove the fact of pay- "ment."

The Pangburn notes do not appear in the Silk Company's pass book.

The three subsequent renewals of May 12, 1894, August 11, 1894, and January 10, 1895, appear in the pass book of the Silk Company as discounted for the Silk Company (pp. 499, 502, 505). As the Pangburn note was not discounted, the subsequent discounted renewals must be deemed to have worked an extinguishment of the Pangburn note.

Phœnix Ins. Co. *v.* Church, 81 N. Y., 218, 226, Andrews, *J.*, held:

"But it may well be that by common understand- "ing and usage when a note is discounted by a bank "to take up a prior note held by the Bank against "the party procuring the discount, and the avails "are credited to him, the transaction is to be re- "garded as an extinguishment of the prior note,

" although it may not have been actually surrendered
" (Slaymaker *v.* Gundacker's Ex., 10 S. & R., 75;
" Bank of U. S. *v.* Daniel, 12 Peters, 34; Note to
" Cumber *v.* Wane, Smith's Leading Cases, 458)."

In Fisher *v.* Marvin, 47 Barb., 159, 161, Miller J., held that " the discount of a new note and the ap-
" plication of the proceeds realized from it to the
" payment of the old paper extinguished the old
" debt and created a new one."

Randolph on Commercial Paper, S. 1511.

Merriman *v.* Social M. Co., 12 R. I., 175.

Letcher *v.* Bank, 1 Dana, 82.

Nos. 3 and 4, January 12, 1894. *None of these series notes appear in the discount register of the Bank nor on the pass book of the Silk Company, and there is nothing to show that the Silk Company ever received any of the avails of these notes*, though the notes of January 3, 1893, appear to have been discounted for the Bank and taken up by the Bank at maturity (Deft.'s Ex. 9, p. 625).

The entry on the deposit ledger of the Bank was not properly proved by the person who made it, and is incompetent for any purpose to establish any debt against the Silk Company. *These notes do not appear on the schedule of note indebtedness of the Receiver of the Silk Company, as there was nothing to show that the Silk Company had received the avails thereof*, and the total of the notes (the earliest being dated *October, 1894*) on the Receiver's list approximately equals the total note indebtedness of the Silk Company to the Bank, as shown by the Silk Company's ledger (Angelo's testimony, pp. 347, 348).

Moreover, there are credited to the Silk Company on the Bank journal of date May 31, 1894, *as paid*, four five thousand dollar notes, two of which are

probably those of January 12, 1894, due May 15, 1894.

Nos. 5 and 6, January 16, 1894. None of this series, except the notes of May 10, 1893, *appear on* the discount register of the Bank or *in the pass book* of the Silk Company.

No. 7, January 18, 1894. Only two notes of this series appear in the Bank discount register, December 23, 1890, and April 25, 1891, and the Pangburn *note with its renewals do not appear in the pass book of the Silk Company.*

No. 8, January 19, 1894. Some of the notes of the series prior to the Pangburn note were in the discount register and some were not, but neither the Pangburn note nor the one preceding it, nor all following it, were in the Bank's discount register nor in the pass book of the Silk Company.

As to this Pangburn note of January 16, 1894, there is a serious question whether it ever was a good and existing obligation, even as a renewal. The original note appears not to have belonged to the Bank, but to one H. E. Brainard and O. H. K. Risley, said Brainard having filed with the Receiver of the Silk Company a proof of claim thereto, and the note itself, bearing the endorsement on the back, " $4,000 of this note belongs to H. E. Brainard. One " thousand dollars of this note belongs to O. H. K. " Risley. (Signed) The Natchaug Silk Company. " Charles Fenton, Treas."; said note was not found in the possession of the Bank, but of Risley (Hayden, pp. 109, 111).

As to this note Judge Lacombe held that " it is " doubtful whether the Bank itself could have es- " tablished any claim."

Moreover, the last renewal of this note was not overdue until the day after the Pangburn suit was begun.

Notes 9-12. Some of prior notes of this series were in the Bank's discount register, and some were not, but not one of the Pangburn notes, nor the subsequent renewals, were either in the said

discount register or in the pass book of the Silk Company. The last renewals of all these notes were not due when the Pangburn suit was commenced.

No. 13, December 15, 1894. None of the prior notes in this series appear in the Bank's discount register, and nowhere in the books of the Bank is the Pangburn note credited to the Silk Company, nor does it appear on the Receiver's schedule of note indebtedness.

Note 15. This note was apparently given to take up a personal obligation of Mr. Chaffee, and was merely a personal accommodation for Chaffee, of which the Bank had knowledge. Of this note, Judge Lacombe held "that number 15 is not an obligation "of the Silk Company."

Before summarizing this testimony, attention is again called to the fact that the evidence shows that blank notes and checks of the Silk Company were signed by the treasurer and given to the cashier of the Bank to do with them as he pleased; that some of them, although included in the indebtedness to the Bank, were not used at all; and that as to what became of the proceeds of these notes and checks, Risley alone knew.

Receiver Hayden testified, on cross-examination by defendants' counsel, as to the Pangburn notes (p. 152):

"My understanding of those notes is that they "were some old notes found here in the First Na- "tional Bank, or somewhere else, that had been "displaced by new ones, or which renewals were "given, and those were put in as Mr. Pangburn's "notes, as a claim against the Silk Company."

Every transaction with the Bank is subject to the gravest suspicion.

The burden, therefore, is on the Bank, which had these notes and data with reference thereto in its possession, to show and establish the validity of

these notes, and the Bank and its Receiver have utterly failed to establish that these notes constituted any valid indebtedness of the Silk Company.

Greenleaf on Evidence, Vol. 2, Sec. 172, holds:

"In an action by an endorser against the original "party to a bill, if it is shown by the defendant a "suspicion of fraud, the plaintiff then will be re- "quired to show under what circumstances and "for what value he became the owner."

Harvey *vs.* Tower, 15 Jur., 544.
Fitch *vs.* Jones, 5 E. & B., 238.

Munroe *vs.* Cooper (5 Pick., 412), was a case where a note was made by a partner in the name of the firm for the benefit of his own private business, without knowledge of the other partners. In the Court below judgment was given for the plaintiffs, but in this Court an order is granted giving defendants a new trial and holding that if defendants can show any fraud by original party, either in the inception of the note or putting the same in circulation, the plaintiff is then bound to explain how and under what circumstances he came into possession of the note.

Wardwell *vs.* Howell (9 Wend., 170), was a case where a note was endorsed by defendant for purpose of renewing a note which was about to become due. The holder of the same took same to the Bank, where old note was to be renewed, and the Bank refused to accept the same. The maker delivered the new note, so endorsed, to some third party for the purpose of securing another debt. The Court held:

"Where a note has been diverted from its orig- "inal destination and fraudulently put in circula- "tion by the maker or his agent, the holder cannot "recover upon it against an accommodation en- "dorser without showing that he received it in "good faith in the ordinary course of trade and

"paid for it a valuable consideration, and as to "whether the plaintiffs took same in the ordinary "course of trade and paid for it a valuable consid- "eration, the whole weight of authority and every "consideration of justice and equity are against "the plaintiffs on this point."

Miller *vs.* Rose, 1 Burr, 452.
Hazard *vs.* Spencer, 17 R. I., 563.

"Where, at a trial, the defendant introduces "evidence to show that a note was illegally or "fraudulently obtained or put in circulation, it is "then incumbent upon the plaintiff to prove that "he is a *bona fide* holder for value without notice."

Constable *vs.* Heir *et al.*, 73 N. Y., 273.

BUT THE COMPLAINANTS, ON THE OTHER HAND, HAVE AFFIRMATIVELY SHOWN THE INVALIDITY OF THE NOTES SOLD TO PANGBURN, AND CLAIM THAT THE EVIDENCE SHOWS AS FOLLOWS:

1. The Pangburn notes, Nos. 1, 2, 5-12 ($48,422.63), were all undiscounted renewal notes, and were themselves, superseded by subsequent renewal notes, and, therefore, had no validity. The Bank had in its possession, after the Pangburn suit had been begun, both the original obligations and all the subsequent renewals of the Pangburn notes.

Under the order of the Court the Bank's Receiver has deposited in Court all the subsequent renewals of the Pangburn notes, and some of the original obligations, but has failed to deposit the original obligations of the Pangburn notes Nos. 5, 6, 7, 8, 9, 10, 13, 14 and 15; he has failed to deposit any of the series of 13, 14 and 15, the first five notes of No. 8, the first ten notes of No. 9, and the first seven notes of No. 10.

"In each of these cases the original debt was, "therefore, not extinguished, and the legal holder "of the eriginal note (*i. e.*, the Bank) can recover

" for it. * * * The delivery of a new note for " indebtedness does not extinguish the indebtedness " nor render the old note void" (Judge Lacombe's opinion).

The Bank cannot, therefore, insist that the Pangburn notes were the evidences of the debt, when it still kept both the original note and the renewals subsequent to the Pangburn notes. The Pangburn renewal notes merely acted as an extension of time of payment to their maturity, and nothing more, and when a further extension of time of payment was given by a subsequent renewal, the Pangburn notes were simply of no value whatever.

If it be objected that the subsequent renewals were not discounted, then it has been proved that the Pangburn notes Nos. 1–12 were not discounted and therefore had no validity either.

2. The last renewals of notes 8, 9, 10, 11, 12 ($25,922.63) were not due when the Pangburn suit was begun, so that no suit could have been legally brought either on the original obligations, the last renewals or the Pangburn notes.

Daniel on Neg., Sec. 1312 (3d. Ed.), states that if the creditor takes a time draft or a renewal note from the principal, the presumption is that the right of action is suspended and the time of payment extended to its maturity.

Hubbard v. *Gourney*, 64 *N. Y.*, 457, held that "the " principle is well settled that where the holder of " a promissory note takes a new note from the " debtor, payable at a future day, he suspends the " right of action upon the original demand until the " maturity of the last mentioned note," * * * and that, too, notwithstanding the fact that the original note is not given up.

Holland Trust Co. v. *Waddell*, 95 Hun, 104, 113, held that the renewing of a note from time to time in no way extinguishes the original debt; it is simply

an extension of the time of payment, and a change as to the evidence of the debt.

Am. Ency. Law, Vol. 15, p. 354, holds that in case of a renewal the remedy on the original note is suspended.

Dan. Neg. Inst. (4th Ed.), S. 205: "When a "dealer at a bank pays off a note by renewal, the "debt is the same; the debt remains unpaid; the "credit is extended."

There can be no doubt that this part at least of the Pangburn judgment is absolutely invalid.

Judge Shipman (p. 715) held as to those notes, "The debts for which the renewal notes now in "question were given, were equitably the debts of "the Company, and to declare by decree of a court "of equity that under the circumstances of the "case, an attachment for their security was in-"valid, because made a few days before their actual "maturity, partakes of the character of an inequi-"table exercise of authority."

This might be true, if the Court were asked so to hold as against an honest *bona fide* creditor, but as against the Bank, or Pangburn, its dummy, every equity requires the Court to discriminate *against*, rather than *for*, the legality of its claim. Having therefore fraudulently included in its claim the amount of $25,922 63 not then due, and which therefore could not be the subject of a suit, the fraud vitiates the attachment against subsequent creditors (Opinion of Judge Shipman and cases cited, p. 714).

3. None of the Pangburn notes 1–12 were discounted by the Bank or credited in any way to the Silk Company, in spite of Dooley's affidavit that the credits "are shown by the pass books of the Nat-"chaug Silk Company" (fol. 435).

4. Notes Nos. 1 and 2, 3 and 4 also appear to have been paid; and the Silk Company apparently never received any avails from the original notes of Nos.

1, 2, 3 and 4, and they do not appear on the Receiver's schedule of outstanding obligations of the Silk Company.

Note No. 13 appears on the discount register of the Bank, but is not credited to the Bank but to a third party, and No. 15 was a personal accommodation for Chaffee and not a debt of the Bank.

Well might Dooley swear in his petition to this Court that the notes were "doubtful debts" (Exhibit 51).

Recognizing that the proofs were strong against him, Dooley is made to testify:

"Q. (By Mr. Paige): Mr. Dooley, in transferring, "in making that assignment to Mr. Pangburn, was "it your intention to transfer sixty-seven thousand "and that number of dollars of the actual debt of "the Natchaug Silk Company?

"By Mr. Putney: I object.

"A. It was.

"Q. When you afterwards discovered in your "possession notes which might be claimed were "renewals of some or any of those notes, did you "send or give them to Mr. Paige with directions to "deliver to Mr. Pangburn?

"A. I did" (Dooley, p. 149).

But Dooley's original petition of May 31, 1895 (Exhibit 51) was only that he might sell *these particular notes*, naming them *in extenso*, to Pangburn for $200 as being "doubtful debts." He surely did not then mean to assign notes which, if valid, would give to Pangburn from the Silk Company 25 per cent. to 50 per cent. of the face value of the notes (Dooley, fol. 429). The Court authorized the sale of only these particular notes and the assignment of these particular notes. No rights as to any other notes were given by this assignment, especially if the other notes were good and not "doubtful debts."

There is no evidence that Pangburn ever got these notes. In fact, Pangburn testified that, after the

original transaction with Paige, he never did anything more in the matter. He said: "I don't know "what became of the notes, and have not seen "them since. I paid no money for them. I do not "know what was done by Mr. Paige in that suit "afterwards" (p. 331).

Another incident which fitly characterizes the whole conduct of the case is as follows:

On the 15th of July, 1896, the last day of the hearing, Mr. Paige produced a paper purporting to be an assignment to one Serven, by Pangburn, for $500 of *the notes* in question, and the judgment obtained thereon (p. 539). Said assignment was not proved, other than by the offer of the paper itself, and no proof of delivery was made; but Mr Paige claimed in his brief before the Circuit Court of Appeals that the notes in question in Pangburn's judgment passed to Serven (see Brief, pp. 100 and 108). This assignment was dated on *March 27, 1896*, and acknowledged on March 28, 1896.

Curiously enough, on April 3, 1896, just after the examination of Mr. Chaffee, the following occurred (pp. 417 and 418):

"By Mr. Paige: I now produce from the posses- "sion, and on the part of Mr. Pangburn, and offer "to have canceled by the Court the following "papers" (being the renewal notes which Dooley says he sent to Mr. Paige for Mr. Pangburn). Where does Mr. Serven come in?

And on July 15, 1896, Mr. Paige, attorney for Dooley and for Pangburn, himself produces the so-called Pangburn notes, and reads them "in evidence "on behalf of the defendant Pangburn."

To sum up this matter: The notes which Dooley, Receiver, obtained leave of Court to assign, are set forth and described in his petition to the Court for leave to sell. The same notes, and no others, were set forth in his complaint, and he got judgment upon them.

After it had been made to appear by defendants'

proofs that these notes were not outstanding and existing obligations, he undertakes to substitute, for the assigned notes, other notes, which are apparently outstanding obligations, and he, therefore, upon the trial, offers to have the other notes, which were not assigned, surrendered for cancellation, and he makes Dooley testify that it was his intention, when he made the assignment to Pangburn, to transfer to him $67,000 of the actual indebtedness of the Natchaug Silk Company.

It is interesting to compare this *ex post facto* intention with the statement made by Dooley in his application to the Court for leave to sell, that the obligations he proposed to *sell were doubtful debts.* It is also interesting to note his testimony (Dooley, fols. 426–429), that, at the time he made this assignment for $200, nominally, he believed that the assets of the Silk Company would pay from 25 to 50 cents on the dollar of all its indebtedness.

The conclusion is inevitable that the Pangburn notes are, indeed, "doubtful debts," so doubtful, indeed, that this Court will not recognize their validity and will thereby put its seal of condemnation on a scheme of fraud, double dealing and imposition on the Court.

Point V.

The complainants, therefore, respectfully request this Honorable Court to reverse the decree of the Circuit Court of Appeals in so far as it limits the recovery of the complainants to a part, only, of the goods in question, and to grant to the complainants the full relief prayed for in the original bill of complaint, and, as the proceeds of the goods which are the subject matter of this action are now in the hands of the defendant,

Dooley, the complainants further ask for a judgment decreeing restitution.

As to the appeal of the defendants Dooley and Pangburn, the complainants ask that it be dismissed.

Respectfully submitted,

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